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## 1956

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## CORRIGENDUM

Page 279: Under heading "Subordinate legislation" after "1956 No. 559" *add* "(H.C. 16—XIV of 1955–1956)."

# PUBLIC LAW

*Spring—Summer, 1956*

## COMMENT

THE problems of constitutional and administrative law are the oldest and the most fundamental in any society. The great arguments of the Middle Ages and of the seventeenth century, changed in form and modified in content, yet engage the attentions of lawyers, of statesmen and of ordinary citizens. The problems are those of power, of individual rights and of the nature of the social organisation under which we live; and the paradox is that public law is so often spoken of as a new subject, and the manifestations today of the inherent conflict between government and the governed, between public and private interest, with planning and control on the one hand, *laissez-faire* and freedom on the other, are regarded as modern developments which have come to their first crisis in this twentieth century.

Yet despite this misconception, which is rooted in a continuing desire to see one's own period as the most critical in world history, there are always particular aspects of the old problems which have a truly modern face. Government intervention in industry may not be new, but the forms of nationalisation are without simple precedent; determinations of private rights have never been solely the province of the courts, but administrative tribunals play a part for which parallels are not easily found; the legislative power of governments is older than the institution of Parliament, but subordinate laws have only in this century so largely detailed the administrative process. It is not enough to see in these developments merely a growth of governmental " interference "; to use such words is to beg too many questions. The State has conferred great benefits in the administration of which a considerable measure of regulation is inevitable. It would be surprising if the existing machinery of the Executive, of Parliament and of the courts was found adequate to deal with the consequent complexities. It would be depressing and the shadow of disaster if the English Constitution suddenly showed itself lacking in the asset of flexibility; it would also be without precedent. A country so industrialised and so highly populated must seek to solve its problems by a system which, under these or other names, takes note of the development of town and country, of the need for an efficient educational organisation, of the dangers of an inadequate health service, of the particular difficulties of the old and handicapped.

So it is that the Government touches us at every turn. But the attendant perils are real. It is no solution to suppose, because life is complex and its regulation inevitable, that we can abdicate responsibility to others. We may be confident, because we know our masters and our political system, that the possibility of irresponsible tyranny on a large scale is small. But a little tyranny can go a long way and grows by what it feeds on. Modern examples are not wanting. The lawyer ought to be concerned with the efficient functioning of the society he lives in. But he ought also to be concerned with the justice of its rules. And the road to justice is paved with proper procedure.

The purpose of *Public Law* is to draw attention to the nature of the present situation and to provide the factual information necessary to its understanding. It will provide a place where the related problems of law and government can be examined and discussed. It will, we believe, be relevant and useful and by focusing attention on the relationship between the State and the individual be of interest to lawyers, officials and all those concerned, professionally or otherwise, with the process of government and the administration of law. Two questions of definition cannot be dogmatically answered: what is law and what is not law; and what is " public " law. We shall try to avoid any accusation of legalism, of forgetting that law is a part of social ordering, related to the whole, not isolated. Public law is both part of the administration of affairs and one of the ways in which that administration is controlled. Problems of the structure of government are certainly our concern but there may be others, including, for example, the policies of political parties and the implications of sociological studies, which we will be happy to read about elsewhere. It is true that law is not only a method; it also reflects an attitude of mind. But law is not politics and it is no part of our function to seek to persuade our readers either that Princes are untrustworthy or that the gentlemen in Whitehall know best.

A particular characteristic of *Public Law* will be its emphasis on the Commonwealth and dependent territories. In almost every country where there are British interests—the great Dominions, Cyprus, Malta, the Caribbean, Singapore, the Gold Coast, Kenya and elsewhere—constitutional issues of the utmost importance are being debated. We hope to publish many contributions from and about these countries.

It is with all these considerations in mind that the style and content of *Public Law* have been determined. Each issue will fall into three main parts. The first part will consist of comment and notes, including a discussion of the more important decisions, proposals and happenings of the three-monthly period under review. The second part will contain two or three full-length articles. The third part will be an attempt, new of its kind, to digest and present in readable form all current developments within the scope of the periodical; this will be in two sections covering the United Kingdom and Commonwealth and Dependent Territories. It will embrace statutes, cases, decisions of administrative tribunals, statements in Parliament, Government publications and other relevant material. It is hoped that it will enable anyone to turn to the appropriate section and there to find out what has happened in that field during the current quarter. The second section will include Commonwealth developments within its scope.

We have been fortunate in the formation of a strong and expert Editorial Board, all the members of which have had considerable practical experience of constitutional and administrative law in the making, both in this country and overseas. We are indebted to them for their interest and help.

In one way, *Public Law* differs from other legal periodicals. They are either general in subject-matter and quarterly in style, or specialised weeklies or monthlies. *Public Law* does not cover the whole field of law but covers a major section. And it is a full-length quarterly. There is a need for consideration of subjects which have much in common. This *Public Law* seeks to do, and may prove to be a pioneer for many. For it is perhaps doubtful how far any single legal periodical can hope to deal adequately with the whole subject.

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The Franks Committee on Administrative Tribunals and Enquiries have started their investigations, as is noted elsewhere, by receiving written answers from Government Departments to a questionnaire and by hearing oral evidence in public from many Departments. This is, of course, the usual method for such Committees and the memoranda of evidence, when published, will resemble those of the Donoughmore-Scott Committee on Ministers' Powers which issued its Report in 1932. The terms of reference of the Franks Committee are similar to half of those of the earlier investigation and it is a sign of changing views that there is no strong demand today for a review of the constitutionality of delegated legislation which is now regarded more as a matter for investigation of the methods of control, particularly by Parliament. The personnel of the present Committee invites comparison with that of twenty-five years ago. Is it unfair to say that the immediately striking difference is in the absence of heterodox members in 1956? A Committee which, like that of today, contains Sir Oliver Franks, Lord Justice Parker, Lord Silkin and Professor K. C. Wheare (to look no farther) cannot be said to be lacking in eminence but the presence of two doughty champions, one from each side of the political fence, might have assisted the Committee. As constituted, the members seem to be almost all committed to The Thing, the Establishment.

Seeing Committees of this sort in action, we wonder whether they are the best that could be devised for their purpose. The adversary approach is beloved in this country but a system which in the courts may, subject to the rules of evidence, be excellently suited to ascertaining, if not the facts, at least the provable facts, is not necessarily appropriate to an investigation of administrative method and the practical working of Government Departments. Evidence drawn by written and oral questions depends for its comprehensiveness and accuracy on finding which are the proper questions to ask. Members of the public who attend the hearings and who happen to have more practical knowledge than most of the Committee of a particular administrative activity being discussed sometimes come away convinced that an incomplete and misleading impression has been created by a witness, entirely without any fault of his, because of the questions he was asked and, more particularly, of the questions he was not asked. If this feeling is justified it may be because, on rent tribunals and the local administration of planning control, for example, the Departmental witnesses have a limited personal knowledge. Later witnesses may be called to complete the picture but one is left with the first opinion rather confirmed: that what is needed for an inquiry of this kind is an investigatory rather than question-and-answer Committee.

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If the Franks Committee is perhaps not the best designed for its purpose, what are we to say of the Restrictive Practices Court in the Bill now before Parliament and summarised on another page? The Government proposes that a judge of the High Court and two lay members should be the determining body on questions of fact. Opposition amendments favour a different sort of Tribunal with more Ministerial responsibility. The constitutional issue is clear and important and the merits of independent judiciary and parliamentary control are once more in conflict. Perhaps the two problems of how best to find the facts and who is best to decide on them cannot be answered by the institution of any single body. The Monopolies and Restrictive Practices Commission, introduced by the Labour Government and strengthened by the present Government, seemed to be a good compromise, with Ministerial decision based on the findings of an expert investigatory group.

On the hearing of any proceedings before the proposed court the opinion of the judge upon any question of law is to prevail but an appeal is to lie on any question of law to the Court of Appeal. This may present some difficulties. Is the question whether a question is one of law (on which the judge's opinion is to prevail) itself a question of law which can be taken to the Court of Appeal? Do the provisions of the difficult clause 16 (which provides *inter alia* that a restriction is to be deemed to be contrary to the public interest unless the court is satisfied that the restriction is reasonably necessary for the protection of the public) give rise to questions of law? The court may determine that a restriction is " reasonable " and the meaning attached to this word seems to be a matter of statutory interpretation, and as such an appealable question of law. But surely this determination is precisely one where the lay members are the most useful. Will it be treated as a question of fact before the court but then, as a matter of interpretation, become a question of law before the Court of Appeal? The Court of Appeal may be forced by this Bill to classify questions of fact and questions of law more precisely than hitherto. That would be a by-product of more general value.

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A nice, if not novel, point of constitutional practice was posed by the result of the debates on the abolition of the death penalty. It will be remembered that on February 16, 1956, the Secretary of State for the Home Department and Minister for Welsh Affairs moved " That this House is of opinion that, while the death penalty should be retained, the law relating to the crime of murder should be amended." Mr. Ede moved an amendment which called on Her Majesty's Government to introduce forthwith legislation for the abolition or suspension for an experimental period of the death penalty. On a free vote the amendment was carried by 292 votes to 246. The Prime Minister then stated that the Government would give full weight at once to a decision taken by the House on a free vote and would at the earliest opportunity make a considered statement as to the consequences which would flow from it. A week later the Prime Minister stated that the Government had decided to find time for a second reading of Mr. Silverman's Death Penalty (Abolition) Bill and this would be on a free vote. He added, " It would not, in our view, be appropriate for the Government themselves to bring forward a measure which they have so recently advised the House against."

Had there been a free vote and no official Government view advanced, no difficulty could have arisen. The House of Commons would have expressed an opinion which the Government would no doubt have taken into account but by which it would not in any way have been bound. It cannot be too often emphasised that it is the duty of the Government and not Parliament to govern the country. This is not altered by the fact that the Government expressed an official view, and the Prime Minister was surely acting in a correct constitutional manner in refusing to bring in a Government Bill because of the vote of the House. What may be doubted is whether the Government on a matter which concerns the preservation of law and order acted with constitutional propriety in allowing a free vote in the first place. In a matter of this kind, although it involves a question of "conscience" ought not the Government if it has an opinion (as it should have) to use its powers to enforce its will? If it fails to enforce its will outside the Chamber, then, since the question is of such importance and so closely concerns one of the fundamental functions of government, ought it not to make the question one of confidence?

Mr. Silverman's Bill received its second reading on March 12 by 286 votes to 262, the Home Secretary advising the House against it.

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## THE MERITS OF DISHARMONY

*Glasgow Corporation* v. *Central Land Board*, 1956 S.L.T. 41, is likely to be a much-quoted case. It is important not only for its discussion of doctrines of precedent, but also for the principles of constitutional and administrative law which it expresses or implies.

There is the acceptance by Lord Simonds of the views of Denning L.J. in *Tamlin* v. *Hannaford* ([1950] 1 K.B. 18 at 25) on the criterion for determining when a public corporation is a Crown servant. Much more importantly there is recognised an inherent right in the Court of Session to override a ministerial refusal, founded on the public interest, to produce documents in litigation. The power, it should be noticed, is not one of deciding whether or not the ministerial refusal is in fact justified on grounds of public policy, it is simply a power to disregard the objection. It was well summarised by Lord President Strathclyde in *Henderson* v. *M'Gown* (1916 S.C. 821 at 825) saying "when the objection is stated by the Government Department, this court will not consider whether the objection is well founded or not; the court will not consider the merits of that question but will grant or refuse the diligence at their discretion." On that basis the dangers in any discussion of why publication would be contrary to the public interest (a discussion which could often be more injurious to that interest than a simple disclosure) are circumvented. In effect, as Lord Radcliffe pointed out, two functions are involved, one is the decision of what is required to protect the interest of government, the other, after allowance has been made for the former, of deciding what is required in the interests of justice. While the Minister may be best equipped to decide the former, it is properly for the courts to determine when the requirements of justice make it necessary to take risks. Clearly the right of making a final decision must rest somewhere and it is reasonable that in matters affecting individual rights it should rest with the courts. This is particularly so since the opinions in the present case make it clear that the question of whether or not to exercise this overriding power must be determined by estimating what is required in order to do justice in a particular case. Beyond this criterion no general rules are laid down for the exercise of the power. It was, though, emphasised that the power was one which should be exercised with restraint. Nevertheless a distinction was made between restraint and undue deference.

Indeed almost as important as the recognition of the power was the attitude of the House to its exercise. Lord Normand emphasised that it " is not a phantom power, and in the last resort it is a real, though imperfect, safeguard of justice." Lord Radcliffe (with whose remarks Lord Somervell concurred), after citing *Ellis* v. *Home Office* ([1953] 2 Q.B. 135) and *Broome* v. *Broome* ([1955] P. 190), suggested that refusals to produce were becoming too commonplace, and in effect invited the courts to exercise this power more freely in the future than they had in the past. The general tenor of the opinions in the House of Lords leaves the power both reaffirmed and strengthened. Its reaffirmation alone may do something to check the growth in Scotland of practices against which the judges in England have protested, but could do no more.

Equally important is the contrast between the sentence in Lord Normand's opinion (at p. 46): " The result seems to lead to the conclusion that there is a difference between the law of Scotland and the law of England on an important constitutional question," and earlier statements which had given undue weight to the desirability of uniform law. This attitude is to be seen in, for example, the opinion of Lord Anderson in *Macgregor* v. *Lord Advocate* (1921 S.C. 847 at 848) saying " As the constitution of Scotland has been the same as that of England since 1707, there is a presumption that the same constitutional principles apply in both countries," or in that of the Lord Justice-Clerk in the same case urging that the position of the Crown must be the same in both jurisdictions. Similar expressions are to be found in the unhappy case of *Mulvenna* v. *Admiralty* (1926 S.C. 842). No doubt on occasion the uniform treatment of institutions is very desirable,[1] and differences can of course lead to complexities, yet, quite apart from major issues of principle, there can be distinct advantages from a dual but co-operating system of law in this field. The merits of the rules of one jurisdiction can show up more sharply the defects of the other, and the successful practical operation of rules in one can most convincingly counter the theoretical fears which inhibit their adoption in the other. It only remains in this instance for the Scottish courts to demonstrate that restrained but effective judicial control is not out of place in a modern State.

J. D. B. M.

## PUBLIC LAW ARRANGEMENTS AND PRIVATE LAW CONCEPTS

Professor Lawson, reiterating Dicey's point, has emphasised [2] that " there is no true distinction in modern English law between public and private law." His generalisation could have been broader still, and have remained as true. It is, though, arguable whether this state of affairs is a matter for congratulation.

Because the forms of private contracts are vague, and because present forms of governmental activity are many, there is inevitably some confusion between the two. Of this confusion *Australian Woollen Mills, Ltd.* v. *Commonwealth of Australia* [1956] 1 W.L.R. 11 is a good illustration. At a time when the price of manufactured woollen goods was regulated in Australia, but auctions of raw wool were re-introduced, it was apparent that the price which might have to be paid at the auctions would make uneconomic the manufacture of garments for sale at controlled prices. A scheme of subsidising manufacturers was therefore introduced, the subsidy being based on the difference between the basic price of wool and the average market price. Payment of the subsidy was to be made quickly and was calculated on individual transactions by the appropriate Government agency. Hence at the end of the scheme questions arose as to the repayment of subsidies which had been received in respect of the purchase of stocks of raw wool still on hand, and which were considered to be in excess of reasonable requirements.

One of the contentions of the appellants, who sought to regain sums representing subsidy payments which they had repaid, was that the various circulars and letters setting out the scheme were to be construed as offers, acceptance of which was made by the act of purchasing at the auctions. It was however clear that to adopt that construction was to force the transaction into a recognised form but one which was in the circumstances quite unrealistic and inappropriate. The phraseology of the letters was clearly non-contractual. They spoke of the " scheme," of discretions, of " determinations," and were clearly designed to carry out a policy of transition from controlled to free trading. In such circumstances the idea of contract is too rigid, and was firmly rejected by the Privy Council. The whole transaction it was said was administrative. Yet, while admitting the appropriateness of the classification here, one passage in the judgment of the Privy Council raises doubts. There is (at p. 14) some suggestion that in circumstances like these legally enforceable rights are dependent on contract, and that the arrangements under the administrative scheme are necessarily discretionary and unenforceable at law. It is evident that in the administration of such schemes by present day methods there will be considerable discretion left to the responsible board or department, yet it cannot be right that the courts should be entirely excluded from the determination of issues which may materially affect the livelihood of individuals or companies. In such circumstances it may be necessary either to modify the conceptions of contract or to envisage other non-traditional forms of obligation under public law in order to provide satisfactory and adequate remedies. While there can be no doubt about the result of the present case, it is nevertheless one which provokes thoughts on the continuing adequacy of the present treatment of public law arrangements.

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[1] See, *e.g.*, *Lord Advocate* v. *Argyll C. C.*, 1950 S.C. 304 (the classification of the Forestry Commission). A good case can be made for the desirability of the uniform interpretation of, *e.g.*, requisitioning statutes as in *Moffat Hydropathic Hotel Co., Ltd.* v. *Lord Advocate*, 1919, 1 S.L.T. 82. It does not however necessarily follow that the " universal " interpretation ought to be finally established in the first case involving the construction of such a statute, as might follow from some *dicta* in the present case. If different rules of constitutional law are to be admitted these rules ought to play their part in the process of interpretation.

[2] Keir and Lawson, *Cases on Constitutional Law*, at pp. 64 and 69–70.

Similar difficulties of fitting policy arrangements into traditional patterns is apparent in *Glasgow Corporation* v. *Western Heritable Investment Co., Ltd.* [1956] 2 W.L.R. 717. Housing subsidy payments had been made by the appellant corporation under the Housing (Financial Provisions) Act, 1924, to the respondent company in respect of houses built by the latter. These houses were by the Act deemed to be subject to certain special conditions, including one that they should not be sold without the consent of the Secretary of State, who could in giving his consent impose conditions on the sale. If the local authority gave an undertaking that these conditions would apply a Treasury grant was available to it to help to meet the subsidy it would pay to the private builder. This condition was also incorporated in an agreement between the corporation and the company. The latter now claimed to be able to sell without ministerial sanction, subject only to all future subsidy payments ceasing. In all three courts they were held entitled to do so; the provision in the Act against sale being construed not as an absolute bar on sale without consent, but merely as fixing an end to the subsidy payments. The same interpretation was given to the term in the agreement between the corporation and the company since that agreement referred to the Act, and hence was to be treated alike. The company was in effect entitled to take the subsidy so long as it wanted to, but if at any time it found it advantageous to break the conditions (which were presumably intended to carry out a public policy), it was free to do so, subject only to suffering a penalty which, *ex hypothesi*, would in the circumstances mean no monetary loss, and so would have no restraining effect. Similarly the ability of the Secretary of State to impose conditions on a sale was gravely impaired. If the company did not think it would like the probable conditions it would sell without consent.

Throughout the opinions in the House of Lords the emphasis was placed on the natural right of an owner to sell, upon technical difficulties, springing from the drafting of the Act, of finding any real burden, and upon the anomaly of persons with no title in the land being able to secure the annulment of any conveyance in breach of the conditions. Of course it is important that there should be adequate machinery to give notice to strangers of the existence of such conditions or limitations, but there are no insuperable difficulties in so providing. Yet it seems that in such arrangements as were here involved the governing factor ought to be the policy of the statute and the effectiveness of the methods of carrying that out rather than the strict traditions of private law. It is true that in the Second Division (1956 S.L.T. 2) the question of the policy of the statute was specifically considered and the idea that it incorporated a policy that houses should be built for letting was rejected. Yet even there the general tenor of the opinions is set by the Lord Justice-Clerk when he said (at p. 8): "However speculation as to policy in housing legislation is dangerous, and over a period of forty years social conditions as well as policy may change. The safer course is to take the statute as one finds it. So taking it, the condition in question, despite its beginning with the words 'no house shall be sold . . . except with the consent of the Board,' is something which is intended to qualify the receipt of financial assistance. . . . The contrary view would put the houses for at any rate a period of forty years *extra commercium* and such a restriction of the ordinary rights of ownership would require to be made explicitly or by the clearest implication." [3]

Quite apart from any question of what policy was in fact incorporated in the statute here in question it is, with respect, at least arguable that arrangements of this sort are designed to carry out a policy, and that, unless they are treated as arrangements of public law, the weight of influences derived from institutions and rules designed for private law conditions may well prove too heavy, and at times frustrate the purpose of the arrangement. The different treatment need not, as has been pointed out elsewhere, work hardship for the individual or for third parties, but it is possible that by too great a reluctance to depart from traditional arrangements the courts may obliquely force governmental bodies which seek to carry out policies, if not by contract, then at least by methods involving the collaboration of individuals, to revise their methods so that all is in fact governed by discretion and disputes determined by purely administrative bodies. Inflexibility can force business elsewhere in law as well as commerce.

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[3] It could of course be said that a price had been paid to the owner for putting his land *extra commercium*, though that would be clearer had the payments taken the form of a lump sum as is sometimes the case under similar legislation.

J. D. B. M.

## JUDICIAL DISCRETION AND DECLARATORY ORDERS

Those of us who, after the decision of the Court of Appeal in *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18, foresaw a thriving future for the declaratory judgment in administrative law, have since had cause to peer again into the crystal. Dicta in *Healey* v. *Minister of Health* [1955] 1 Q.B. 221, served to warn prophets to be circumspect. The Court of Appeal's recent decision in *Vine* v. *National Dock Labour Board* [1956] 2 W.L.R. 311, has underlined the warning. The plaintiff, a registered dock worker employed by the National Dock Labour Board, was dismissed for a disciplinary offence by a committee appointed by a local dock labour board. The local board had no authority to sub-delegate its disciplinary powers, which were of a judicial character, to a committee; the purported dismissal of the plaintiff was therefore a nullity. Ormerod J. awarded the plaintiff £250 damages for wrongful dismissal and a declaration that the action of the Board was invalid. The Court of Appeal dismissed the Board's appeal in respect of damages but, by a majority, set aside the award of a declaration.

Singleton L.J. took the view that damages were a sufficient remedy, and that in any event the award of a declaration might promote disharmony, for the Board might decide not to act in compliance with the declaration—there was evidence that the plaintiff had been a troublesome worker—and this could lead to further litigation. With all respect, this seems an unduly pessimistic attitude to adopt. It would be remarkable if a public authority having the means to comply readily with the order of a superior court were deliberately to refuse to do so. Moreover, as Jenkins L.J. pointed out in his dissenting judgment, if the plaintiff, after having been restored to the register, were to be a co-operative worker, all would be well; if he were to commit further disciplinary offences he could be dismissed by the appropriate procedure. The plaintiff wanted to continue to work in the docks; he had been wrongfully dismissed; why should the court refuse to declare that the termination of his employment was invalid? His Lordship was disposed to allow the grant of a declaration to stand but to reduce the award of damages.

Parker L.J. held that the plaintiff had elected before the date of the trial to treat the breach of contract as a repudiation and to claim damages only, and that it was not open to him subsequently to amend his claim. On the alternative interpretation, that the contract had not in fact been repudiated, his Lordship held that damages were an adequate remedy: a declaration was a discretionary remedy which ought to be granted sparingly, and this case was comparable, though not identical, with one of breach of contract between master and servant, for which a declaration could not be granted. *Barnard's* case was distinguishable, for there " the only way in which the matter could be decided was by the granting of a declaration."

The decision is somewhat disappointing. The court could have found precedents (if any were needed) for the award of a declaration to a person wrongfully dismissed by a public body: see, *e.g.*, *Hanson* v. *Radcliffe U. D. C.* [1922] 2 Ch. 490. There is a danger that the declaratory order may, like mandamus, be elevated (or relegated) to the status of an extraordinary remedy confined to a limited number of classes of cases and dispensed only to especially deserving suitors. If this comes about, hopes that the courts may be able and willing to develop the declaratory order as an effective substitute for the more antiquated public law remedies will be wholly frustrated. In one respect, however, the decision is to be welcomed: as in *Barnard's* case, the disciplinary functions of the Board were held to be judicial. It will now be increasingly difficult to support the authority of recent decisions of the Divisional Court in which the functions of public officers have been held *not* to be judicial *because* they were of a disciplinary character.

S. A. DE S.

# ADMINISTRATIVE JURISDICTION

SIR CARLETON ALLEN, Q.C.

## TYPES AND CHARACTERISTICS OF TRIBUNALS

### INTRODUCTORY

NOTHING is more remarkable in our present social and administrative arrangements than the proliferation of tribunals of many different kinds. There is scarcely a new statute of social or economic complexion which does not add to the number. Many existed before the Second World War, but since then they have multiplied rapidly. One may be permitted to express surprise that it is possible to find enough qualified persons to man (and woman) them efficiently, and if they continue to be sown like dragon's teeth, this difficulty may be considerable in future. At the present time of writing, the Lord Chancellor's department alone is responsible, under various statutes, for appointing chairmen or panels of some forty-one tribunals and similar bodies.

All this is indeed a revolution in our judicial system, for we cannot today, with any degree of realism, confine that term to the traditional courts of law, even though those courts themselves have been greatly augmented and recruited of recent years. My present observations are intended merely to describe an existing situation. Whether the " Welfare State " in which we live is necessary or not, or admirable or not, is a matter of political persuasion and is irrelevant for present purposes. We have to deal with existing facts, and one of them is that the ordinary courts cannot possibly deal with all the administrative issues which are now " justiciable." There are about twice as many High Court judges as there were a hundred years ago, not to mention the county court judges (now over sixty in number) who at that time were a very recent creation (dating from 1846), or the 17,000 lay magistrates and the stipendiary magistrates and recorders; and yet it is notorious that this judicial host has great difficulty in keeping abreast of its civil and criminal work. It would be absurd, in this state of things, to limit the description " judicial " to those tribunals which, in our textbooks, fall within the category of " courts."

Nor can it be emphasised too often that an adjudicating body does not cease to be " judicial " because it is composed of persons who are not professional lawyers. That would indeed be a strange contention in a country which has maintained for nearly six hundred years a unique system of criminal jurisdiction administered mainly by laymen. I am inclined to think that familiarity with summary jurisdiction—often though it is criticised—has disposed the British public to accept with comparatively little objection the extension of the same principle to a great many administrative decisions. The judge in the seat of office still retains his special prestige and authority among us, but it does not follow at all that the " common man " looks for justice only to the scarlet and ermine. At all events, there can be few countries where so many citizens sit in judgment on their fellow-citizens as in Great Britain today. It may be that our rapidly extending network of tribunals has an advantage which is often claimed for the justices of the peace—namely, the diffusion among a considerable body of citizens of a sense of personal responsibility for the good order of society. There is no reason to doubt that the great majority of those who are now entrusted with judicial duties in the administrative sphere take their responsibilities seriously and honestly. Were it otherwise, the whole system would soon break down in confusion and disrepute. It is therefore no reflection upon their members that some of these tribunals possess uncontrolled powers which present perturbing opportunities of error and obliquity, and, human nature being human, the means of injustice must be restrained as prudently as injustice itself.

I must not give the impression, however, that all these tribunals are of " lay " character. An increasing number of them are presided over by, or comprise, persons with legal qualifications, and there seems to be a growing tendency to insist on this requirement. There is, in any case, a close and necessary connection between the tribunals and the legal profession. In some instances, through what I believe to be a mistaken policy, legal representation is forbidden; but this is not true of the majority of tribunals, and there are not a few members of the Bar who practise much more often (and more lucratively) before tribunals, public local inquiries, and the like, than before the ordinary courts. No solicitor can advise a client today, especially on any question of property, by rules of common law and statute alone; half, perhaps more than half, of his technique today is concerned with Statutory Instruments, which, like other kinds of instruments, have to be meticulously inspected and sterilised before they can be used. For the modern lawyer, tribunal procedures and Ministerial decisions are very definitely a part of the judicial system in which he has to employ his craft.

There does not yet exist, so far as I know, any complete and detailed survey of all the tribunals and other administrative-judicial agencies in this country. There are various lists and outlines, but none of them professes to be complete—and this is not surprising, because the position is constantly changing with new legislation. A really comprehensive survey would involve not only an exhaustive examination of statute, sub-statute, case-law and many departmental reports and publications, but personal visit to and acquaintance with innumerable " agencies " all over the country, to observe their actual working and procedure; for these cannot be learned from the printed page. A very little acquaintance with tribunals, as with courts, soon impresses on the observer the eternal difference between " law in books " and " law in action." There is great scope for industry and research in this respect, though the task is certainly formidable.

Nothing on this scale can be attempted here, for it is far beyond the writer's knowledge and opportunities or the time which he can reasonably hope for. In this brief survey, therefore, I will not attempt to do more than mention, under different classifications which do not pretend to be more than approximate, a number of representative existing tribunals, pausing only to call attention to any features which seem specially worthy of remark. For details of history, constitution, and relevant case-law, except so far as this latter may appear in various connections in the text, the reader must look to other sources of information.

The chief kinds, then, of our many tribunals may be grouped under the headings which follow.

## THE SOCIAL SERVICES

### *The National Health Service*

In the forefront of tribunals and similar bodies connected with social services are those which are constituted under the National Health Service, and they form the most elaborate plexus of adjudicating agencies which our society or our law has yet devised. Strict supervision and discipline are no new experience for the medical profession. Under the former National Health Insurance Acts the Minister of Health possessed remarkable disciplinary powers over " panel " doctors for many different kinds of professional lapses, ethical and technical. There was no appeal from his penalties—which might be severe, to the point of deprivation of livelihood—though he was assisted by an Advisory Committee; and it is interesting to recall that this committee was not ordained by statute but was established at the instance of the medical profession itself.

Great changes were wrought by the National Health Service Act, 1946, and today doctors, dentists, pharmacists and opticians, who are within the service—and this means the vast majority of them—are encompassed by a veritable maze of precautions to ensure efficiency and propriety.

It is difficult to describe the whole system even in outline, and some attempts which I have made to show it in diagrammatic form have defeated my ingenuity. We begin on the ground floor, so to speak, with the local committees, which are of two kinds. There is one for each branch of the service—medical, dental, pharmaceutical and ophthalmic. Each of these serves a double function; it advises the Executive Council on service requirements in its own branch in the locality, in connection with applications by practitioners to be registered under the service; and it hears complaints against practitioners for technical offences under the Regulations, such as " excessive prescribing " (erstwhile familiar under the former Acts) and irregularities in the certificates and records which nowadays form a large part of a practitioner's routine work. It has jurisdiction in certain other professional matters, such as specialist fees and dental estimates, and from its awards, or those of an Executive Council in the same kinds of disputes, appeal lies to the Minister (advised by specially appointed referees in some instances).

Alongside these are the Service Committees, again in each branch, together with a Joint Services Committee; and a Dental Estimates Board. Their main function is to investigate complaints. Their inquiries are conducted in private, no publicity or legal representation being allowed, and, except that their procedure is more informal, they seem to discharge much the same office as examining magistrates who have to determine whether a prima facie case has been made out against an accused person. They report to the Executive Council.

Here we are still on the local plane, but the Executive Council is a very powerful body in its area. It serves two principal purposes. It entertains in the first instance applications by practitioners to be registered in the district and it has to consider the local service requirements. Secondly, it adjudges complaints referred to it by the Service Committees. Short of striking a practitioner off the register, it has very wide disciplinary powers in the form of fines, conditions and cautions, and from its decisions appeal lies directly to the Minister, except in one important case which will be mentioned.

We now move to the national level. Here there are a Central Health Services Council and Standing Advisory Committees, which, however, are not judicial bodies. The Central Council makes an annual report to the Minister who, in his turn, reports to Parliament. Here there are two tribunals with distinct functions. First, the Medical Practices Committee, which is appointed by the Minister, is charged with the responsibility of assuring that the medical and allied services are distributed as beneficially as possible throughout the country and that practitioners are registered accordingly. It therefore hears references from local Executive Councils about service requirements, and any applicant who is rejected or who is dissatisfied with the conditions imposed upon him has an appeal to the Minister. The other central body is the National Health Service Tribunal, which is purely disciplinary. It entertains only complaints which may, prima facie, be serious enough to justify striking off the register. If an Executive Council refers a matter of this nature, the tribunal is bound to entertain it; if the complaint comes from any other source, it may use its discretion. The vast majority of causes come to the tribunal after preliminary investigation by an Executive Council, though it by no means follows that its reference will entail conviction. From the decisions of the National Health Service Tribunal appeal again lies to the Minister.

Finally, at the head of the hierarchy, is the Minister himself. Besides many functions of the kind which may be described as "managerial" (see *post*, p. 70), he possesses judicial powers of the gravest moment to practitioners, and in them he is assisted by delegates of various kinds. His principal appellate powers are these: (1) Appeals from the Medical Practices Committee. If there is an oral hearing (there need not be), it comes before delegates appointed for the purpose, who report to the Minister. (2) Appeals from Executive Councils on complaints which do not go to the National Tribunal—*i.e.*, on all but the gravest charges. These come before hearing officers who report their findings. These cases are generally concerned with fines proposed by an Executive Council. They may be very considerable, ranging from £10 to £1,000. It is understood that appeals are comparatively rare. Even if the practitioner does not appeal, however, he is given another opportunity to defend himself; before directing the Executive Council to recover the fine (which may not be the same as that recommended by the Council), the Minister must give the practitioner "a reasonable opportunity of making representations to him either orally or in writing." If this opportunity is taken, and an oral hearing is asked for, again nominees of the Minister are appointed to hear and report; and, in addition, in most cases there must be a reference to an Advisory Committee. On an actual appeal, legal representation is allowed; whether the same applies to the "reasonable opportunity" hearing I am not informed. (3) Appeals from the National Tribunal on complaints which may involve striking off the register. These come in the first instance before a hearing officer with a professional assessor. Their report is then referred to a medical or dental Advisory Committee, which reports to the Minister. It is impossible to say whether, even after all this screening, the Minister personally examines in detail every one of these numerous appeals; he must be advised by permanent officials, so that there is at the bitter end another adjudicating or advisory body hidden from view—though doubtless in difficult or " borderline " cases the Minister brings his personal judgment to bear. (4) Appeals from local Medical Committees concerning more or less technical " breaches of conditions of service." These may lie either at the instance of the accused practitioner or of the Minister himself. They are heard by officers who report upon them. (5) Certain arbitral functions in disputes with Executive Councils—*e.g.*, contested claims by an individual to medical services or differences between Executive Councils and local authorities about the conduct of health centres.

In all these instances the decision of the Minister is final. This is a very grave power to place in the hands of the executive, especially when professional reputation and livelihood are at stake. " It is a new thing," Lord Justice Denning has observed,[1] " to have questions of this kind authoritatively determined by a Minister—which means by the officials in his department." And despite all the elaborate and protracted examining and advisory procedures, the Minister does not necessarily accept their findings and recommendations. In the matter of fines, there is evidence (not, however, made public) that he often increases or reduces those recommended. Nobody knows, or can ascertain, on what principles he does this. It is interesting and instructive to recall the legislative history of this Ministerial power. When the National Health Service Bill was in Committee, an amendment was proposed (June 26, 1946) to provide a disqualified practitioner with an appeal to the High Court. The Minister of Health, Mr. Aneurin Bevan, " speaking with some warmth," said: " This amendment would mean judicial sabotage of our socialised services under which the functions of industrial discipline would be entrusted to the judiciary." Nevertheless, the amendment was carried by 19 votes to 17. When the relevant clause (42 and 7th Schedule) was before the House at the Report stage,[2] the Minister moved to reverse this defeat and to exclude judicial review. He said that the proposed appeal was " an absurdity in which hon. Members who followed the headlines in the newspapers and not the principles of the case had landed themselves," and that their principles were " absurd, false and artificial," and he added that " the tribunals under the Act are far more competent to judge than the

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[1] *Freedom under the Law*, 95.

[2] H.C. Deb., July 23, 1946 (Vol. 425, cols. 1978 *et seq.*).

High Court." The Minister's motion was carried by a Government majority of 167.

The functions which have been described do not by any means exhaust the judicial responsibilities of the Minister—*e.g.*, there are certain local inquiries which he may order. Nor need I refer to his powers with regard to the transfer and compensation of officers, superannuation, or to such bodies as the Practices Compensation Committee, or the panels and committees of arbitrators concerned with the transfer of hospital property and with medical partnership and similar agreements (these latter under the National Health Service (Amendment) Act, 1949).

I refrain also from describing in detail the composition of all these different judicial agencies. It is enough to say that they contain a blend of the legal and the medical, and care is taken that for each branch of the service there is expert professional representation. The two national committees are governed by strict provisions. The chairman and members of the Medical Practices Committee are nearly all experienced medical men, appointed by the Minister. The chairman of the National Tribunal is a lawyer appointed by the Lord Chancellor, and the two other members are appointees, with medical experience, of the Minister. The composition of the other hearing or advisory bodies is governed with great particularity by regulations, and indeed the whole system is regulated by a code of subordinate legislation of which this country, or probably any other country, has never seen the like. I calculate that since the National Health Service Act was passed over 700 pages of close print have been occupied by its progeny in the annual volumes of Statutory Instruments. If there is anybody alive who is acquainted with all their provisions, he must be more or less than human. Most of this subordinate legislation is derived from sections of the Act (*e.g.*, ss. 33 and 40) which confer, in very vague and general terms, power to make regulations; it is questionable whether all those which have been made fall within the terms of those sections, but they have never been tested, so far as I know, for *vires*. (The clauses governing regulations for superannuation compensation and transfer of functions (ss. 68 *et seq.*) are much more detailed and precise.)

Decisions of the Ministry on complaints against practitioners are published, and they make very interesting, if often sombre, reading. It is a nice question whether the aberrations both of practitioners and of vile bodies are for the weeping or the laughing philosopher.

The introduction of the National Health Service was a vast and complex enterprise and it clearly could not be brought into effect without a mighty effort of design and regulation. Nevertheless, I respectfully agree with Professor W. A. Robson [3]—no enemy of social experiment—that the judicial system which it has created is "fantastic." It is tribunalism run mad, and it is impossible for layman or lawyer, or indeed medical man, to resist the belief that it could be greatly simplified with advantage to all. Professor Robson pertinently mentions that a complaint against a practitioner may have to go through six stages—all, of course, time-consuming—before it is finally decided; and it may be imagined what it means to a professional man to have a charge which may involve his whole reputation and livelihood hanging over his head so long and so menacingly. Even if he is ultimately vindicated, he is likely to suffer in practice and reputation in the meantime, and perhaps permanently. It is to be remembered that all this prefectorial code is supplementary to the professional discipline vested in the General Medical Council and the Dental Board, with their jurisdiction over " infamous conduct in a professional respect " [4]; it is also additional to the civil liability, which has become increasingly hazardous of recent years, of practitioners for alleged negligence or incompetence, not to mention the risks which they notoriously run from the complaints of hysterical or unscrupulous patients, especially women. When every citizen is a patient, it is right and necessary that the strictest standards should be required of those who hold life and health in their hands; but one is sometimes tempted to wonder whether the doctor or the patient faces the greater perils when the infinite frailties of the human organism are under renovation and repair.

### *Industrial Injuries*

I have dwelt at some length on this example, because it is unique in our society. I must be more laconic in mentioning other judicial bodies concerned with social benefits, especially those others which affect physical well-being. In this field one of the most important is industrial injuries. In 1897 Parliament began to experiment with a system of Workmen's Compensation which was a new principle of " liability without fault," and which was extended by a series of Acts between 1897 and 1925. The employer, in addition to his other obligations, became an insurer of a wide classification of employees against injury or illness sustained at work. Naturally, the employer insured himself against his risks—indeed, in the days of domestic service every paterfamilias had to do so—and there was, in effect, a vast, nationwide system of insurance of this kind, but conducted by private enterprise. The scheme did not work unsatisfactorily, save in one conspicuous respect. Points of law were referable to the courts, and the result was a prodigious volume of litigation. Many appeals went through three stages, from county court to Court of Appeal and thence to the House of Lords, where they had to be financed by Trade Unions on the one side or wealthy corporations on the other, since they were far beyond the resources of most private individuals, especially workmen. One statutory phrase alone, " an accident arising out of and in the course of his employment," must have cost millions of pounds in litigation; and, as is usual in such an unwieldy mass of precedent, the law itself became extremely confused and confusing. Legal recourse was obviously necessary in such a complex field, but if there was ever a case for limited appeals and a special jurisdiction, it was this.

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[3] *Justice and Administrative Law*, 3rd ed., 143.

[4] A practitioner may have to face a double trial on the same charge. If he has been convicted of a felony or misdemeanour in a court of law the conviction is *res judicata* and cannot be reopened, and this now applies also to findings of fact in a matrimonial cause (Medical Act, 1950, s. 18 (2), which reverses the decision in *General Medical Council* v. *Spackman* [1943] A.C. 627); but the findings of an Executive Council are not binding on the General Medical Council or the Dental Board, and therefore a complaint made under the National Health Service may be entirely reopened, from a different point of view and under different powers, before the Council or the Board.

It has now been established, and the National Insurance (Industrial Injuries) Act, 1946, has done what, with greater foresight, might have been done in the first instance—though it is only fair to say that in 1897 neither Parliament nor the public was as acclimatised to a system of civic contributions and benefits as it is today. The ladder of adjudication under the new system comprises the local insurance officers, local tribunals, the Industrial Injuries Commissioner and the Minister. These are designed on much the same lines as the judicial agencies for the general plan of national insurance, which we will next mention. Since, however, this department of national insurance is principally concerned with disablement or death caused by injury or industrial disease, a special responsibility rests on the medical tribunals established by the Act. These are Medical Boards, appointed by the Minister, consisting of two or more medical practitioners, whose function is to make provisional assessments of disablement benefits. From these an appeal lies, at the instance either of the claimant or the Minister, to a Medical Appeal Tribunal, consisting of a legally qualified chairman and two practitioners. If the appeal is only on provisional assessment of the extent of disablement, it cannot be brought until after the expiration of two years; but both the boards and the tribunals are empowered to review their assessment and decisions at their discretion at any time in the light of fresh evidence. Procedure is governed by copious regulations. There are some thirteen Medical Appeal Tribunals, regionally distributed. They differ from the other insurance local tribunals in the notable respect that their hearings are in public and that they announce their findings of fact.

### *National Insurance*

The remaining field of national insurance consolidates all pre-existing types and covers the very wide variety of unemployment benefit, family allowances and maternity benefits, sickness and death benefits, old age and widows' pensions. All this necessarily involves an elaborate structure of adjudication, for which the Act of 1946 lays down some general principles, but which is governed in detail by regulations. The manner in which these regulations are made is interesting and of excellent example. Section 77 of the National Insurance Act, 1946, provides that before making them and laying them before Parliament, the Minister must submit a draft to the National Insurance Advisory Committee. The latter then notifies " persons affected " and gives opportunities of objection within twenty-eight days. The Committee, having considered the draft and the objections, if any, reports to the Minister, with such amendments as it may wish to suggest. Unless he certifies urgency or some other special reason, the Minister then lays his regulations before Parliament with a statement of the Committee's amendments and with reasons for rejecting any which do not commend themselves to him. The first regulations made under the Act were long in gestation and were considerably influenced and improved by the recommendations of the Committee.[5] A similar Advisory Council is established by the National Insurance (Industrial Injuries) Act, 1946, s. 61, and consists of an equal number of representatives of employers and insured persons. The section is not so wide in its terms as that of the National Insurance Act, but under it the Minister is bound to refer proposed regulations to the Council for its " consideration and advice," which, however, he is not bound to accept or to explain to Parliament. These are valuable forms of " screening " Statutory Instruments, and I share Professor Robson's wish that they might be employed more frequently.

The great majority of the huge number of claims and queries in these different branches of insurance are presented by humble folk who cannot be expected to understand the technical questions involved. The Ministry has numerous local branches and many of the problems can be, and are, settled " on the spot " by the insurance officers and inspectors. If the claimant desires a higher ruling, he can go to the local appeal tribunal,[6] the equivalent of the Medical Boards and Appeal Tribunals which we have met in the field of industrial injuries. There are more than 300 of these tribunals and the number of persons included in their panels[7] is about the same as the total number of justices of the peace in the country. Each tribunal consists of a chairman (often a lawyer) and two other members drawn, as the nature of the appeal may require, from panels of employers, self-employed and non-employed persons. The hearings are in private—it is difficult to understand why, since, as we have seen, it is otherwise with the Industrial Injuries Tribunals; representation is allowed by friends, Trade Union representatives and other laymen, but, except by special leave, not by members of the legal profession. Here the motive is economy, but I shall suggest that this is questionable policy. The procedure is very informal and there is no power to summon witnesses or take evidence on oath. Reasons must be given for the tribunal's decisions. There is no appeal to the courts, the appellate authority being the Commissioner or his deputy, to whom, on certain defined conditions, recourse lies. He is a whole-time national officer, appointed by the Crown, and of high legal qualifications—in effect, a member of the judiciary, with the status at least of a county court judge. The Commissioner gives reasoned and sometimes elaborate judgments, which are published, and which are building up a *corpus* of law and precedent in this extensive field.[8] He is assisted in his duties by several deputies (at present five, who are all lawyers, two being Queen's Counsel).

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[5] See Robson, *op. cit.*, 200 *et seq.*

[6] And frequently does. Appeals in family allowances have ranged from 7,582 in 1947 to 2,689 in 1953, and a large proportion have been successful: see G. A. Campbell, *The Civil Service in Great Britain*, 114.

A curious feature of the whole system is that despite this widely distributed scheme of adjudication certain vital determinations are reserved to the sole jurisdiction of the Minister. These concern the conditions of contribution, the class of insured person into which the claimant falls, and disputed questions of entitlement to a death grant. From the Minister's decisions in these matters appeal lies to the High Court, but on points of law only. It is not at all easy to see why these questions, which lie on the very threshold of many claims, and which are essentially judicial,[9] should fall to the executive, when so much else is committed to tribunals.

### *National Assistance*

The largest remaining field of adjudication in the social services is National Assistance, now governed by the Act of 1948, with some minor amendments introduced by the Act of 1951. The main policy of the Act was to replace the old Poor Law by a new plan of relief of destitution, over and above benefits provided by national insurance. By the Act every local authority is required to provide " re-establishment," reception and accommodation (together with arrangements for deaf, dumb and other disabled persons), and the Minister has default powers if these duties are not performed. At the head of the whole system is the National Assistance Board, a corporate body consisting of not less than three and not more than six persons (including at least one woman) appointed by the Crown. It has a large measure of independence, but is bound to report annually to the Minister of National Insurance, who reports to Parliament. There are Advisory Committees to assist general policy and the Minister has power to hold inquiries. The Board is represented throughout the country by a large number of officers, who, as in the other cases of entitlement which have been mentioned, deal with the great majority of the cases " on the spot," making small grants according to immediate necessity. Any applicant who is dissatisfied with an officer's decision, or who is refused assistance, can appeal to a local tribunal, from which there is no further appeal. Each tribunal consists of a chairman and another member appointed by the Minister and a third who is selected from a panel representing work-people nominated by the Minister. The procedure of the Board and of the tribunals is governed by numerous regulations.

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[7] A report of the Ministry in 1950, cited by Professor Robson (*op. cit.*, 208), gave the number as 16,000.

[8] Hereon see Mr. A. Safford, Q.C. (a Deputy Commissioner), "The Creation of Case Law under the National Insurance and National Insurance (Industrial Injuries) Acts," *Modern Law Review*, May, 1954, 197.

[9] The Minister may decide out of hand, or if he prefers, may appoint any person of his unfettered choice to hold an inquiry and report to him. The inquiry has all the characteristics of a trial at law, with power to summon witnesses and take evidence on oath, and with legal representation; yet the whole procedure is

Any scheme for the relief of poverty is liable to abuse, and safeguards are vested in the Board, in the tribunals and in courts of summary jurisdiction with regard to wilful and persistent idleness, neglect to maintain dependants, fraudulent claims, compulsory training and work, and the like. Prosecutions are not uncommon, but are instituted only in flagrant cases. One unhappy result of the system is that the community sometimes has to pay twice over for the maintenance of its recalcitrants, since it frequently happens that a wife whose husband has been sent to prison is left destitute and has to resort to national assistance. However, so far as a limited experience can form a judgment, the system seems to be administered humanely and even generously, but with proper vigilance against exploitation and fraud.

### *Family Allowances*

Family Allowances, which were introduced by the Act of 1945 (amended by an Act of 1952), are another branch of the social

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purely departmental, with no obligation to state reasons or disclose the report. Why should this secrecy be appropriate in issues which involve many difficult technical questions of interpretation?

services. Disputed claims under this head are decided in the first instance by the Minister of National Insurance, with appeal to referees who must be barristers or solicitors and who are selected by the Minister from a panel nominated by the Lord Chancellor. It is at the discretion of the referee whether, on the statements put before him by the appellant and the Minister, an oral hearing is necessary; if it is held, there may be legal or other representation at the option of the claimant. A large number of these appeals is heard every year. A case may be stated by a referee for the opinion of the High Court on a point of law, but this seems to be a rare occurrence.

### *Unprotected Children*

The care of orphan and " underprivileged " children is a branch of social service which has grown gradually through a long process of legislation. It is now governed by the Children Act, 1948. Besides the institutions which local authorities are bound to maintain for deprived or unprotected children up to the age of eighteen, there are the voluntary homes which were formerly regulated by the Children and Young Persons Act, 1933, and which are now conducted according to regulations made by the Home Secretary. Any voluntary home established since the passing of the Act of 1948 must apply for registration to the Home Secretary, who also has power to remove from the register any institution which is in default. Against his refusal to register or his order of deregistration an appeal lies to a tribunal of three. It is drawn from two elements—a " legal panel " of chairmen appointed by the Lord Chancellor of persons with such legal qualifications as he may prescribe, and a " welfare panel " of persons experienced in child welfare work; this is appointed, rather surprisingly, by the Lord President of the Council, who does not otherwise bear many responsibilities of this kind. An interesting feature of the scheme is that the Home Secretary is bound to comply with the direction of the Appeal Tribunal. Procedure is governed by regulations made by the Lord Chancellor. There is also an Advisory Council on Child Care, appointed by the Home Secretary and including persons of experience in this field and also in local government.

## LAND : PLANNING AND HOUSING

The rapid growth of population in the nineteenth century, accompanying industrial expansion, was for long unregulated and inevitably led to two major problems with which legislation has been wrestling for a great many years; the housing and, what is even more important, the re-housing of the people, and a comprehensive economy in the use of land according to the needs of the nation. In recent years the position has been much complicated by increasing requirements of land for new public purposes, military and scientific (especially airfields and training areas), connected with defence, not to mention a revivified agriculture. Needs which were already acute have been made imperative, and indeed almost desperate, by the impact of two wars. The only good which has resulted from that ill wind is that it has accelerated the process of rehousing; but on the other hand it has enormously intensified problems of requisition, compensation and rent restriction. The great trouble with the " tight little island " is that it is far too tight.

### *Housing*

In the general scheme of the Housing Acts, the chief is the Act of 1936, which is now amended in many respects by that of 1949. Until this latter date the preoccupation was with housing " the working classes "; this ambiguous description is now banished by Parliament, doubtless on the assumption that either all members of the community, or else none of them, now constitute the working classes. The public, and especially landlords, have become familiar with the processes of slum clearance and with orders of demolition and compulsory purchase[10]; we shall refer to the appellate powers of the Minister in this field (*post*, p. 73). Appeal from the Minister lies to the courts and it has given rise to a great and ramified volume of litigation. It is more extensive than can be examined here in detail.

### *The Central Land Board*

The decisions of the Minister of Housing and Local Government on development applications are frequently preceded by inquiries held by his inspectors. Under the Act of 1947 wide judicial and financial functions were exercised by the Central Land Board in fixing the amount of development charges on real property and also in entertaining claims for payment from the compensation " pool." The development charge was abolished by the Town and Country Planning Act, 1953, and the duties of the Board are consequently much curtailed and are now concerned with retrospective claims and adjustments of charges made before November, 1952.

### *Rating: the Lands Tribunal*

One of the most radical recent changes in the law of bricks-and-mortar is in rating. Under the former system, which was governed principally by the Rating and Valuation Act, 1925, valuation appeals were heard first by the assessment committees, which were really a branch or department of the local authority in county or borough, and which discharged a confusing blend of administrative and judicial functions.[11] The Local Government Act, 1948, replaced these by valuation courts, which are of an entirely different character and are essentially judicial. Each consists of three members only, selected from panels submitted to the Minister of Housing and Local Government by one local authority or by a combination of several. Procedure, conditions of tenure and similar administrative details are provided for in the local schemes, subject to general regulations made by the Minister, and each court has a salaried clerk who appears to perform much the same office as a clerk to magistrates in advising on the law (the chairmen and members of the panel are not required by the statute to have any special qualifications in rating law and practice). Whereas the old assessment committees sat in private, these new tribunals hold public sessions, with legal representation at the option of the parties. The decision of the court is binding on the local valuation officer, who also in practice acts in much the same way as the insurance officers in settling by agreement many minor cases of doubt or dispute.

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[10] These are now considerably revised by the Housing Repairs and Rents Act, 1954, but the provisions of that statute do not concern us in this connection.

Under the Local Government Act, 1948, appeals from local assessment committees, which had lain previously to Quarter Sessions, were transferred to the county courts (the Act also provided for arbitration). They have now been transferred again to the Lands Tribunal set up by the Act of that name passed in 1949, with effect from the beginning of 1950. Appeals from the local Valuation Courts now lie to this tribunal, which also has a wide jurisdiction, formerly exercised by referees, in many matters concerning compensation for compulsory acquisition or " injurious affection " of land.[12] It is also an appellate tribunal from the Central Land Board in respect of disputed levies or claims under that branch of the Town and Country Planning Act, 1947. With the approval of Parliament, the jurisdiction of the tribunal may be extended by Order in Council; and this has been done in order to transfer to the tribunal appeals from the War Damage Commission[13] (*post*, p. 43) and from the tribunal authorised by the Town and Country Planning Act, 1944 (4th Sched.) for compensation for compulsory purchase of lands held by statutory undertakings, such as gasworks and similar public utilities.[14] Its members, who are appointed by the Lord Chancellor, consist partly of legally qualified persons (the President must have held judicial office or be of at least seven years' standing at the Bar) and partly of experts in land valuation, appointed after consultation with the President of the Royal Institution of Chartered Surveyors. It is peripatetic and frequently views disputed land *in situ*; its sessions, which may be held before one or more adjudicators according to circumstances, are public and legal representation is allowed. It gives reasoned decisions and an appeal on points of law lies, by case stated, to the High Court.[15] So far at least as appeals against valuation are concerned, it is a great improvement on the earlier vicissitudes of this constantly changing branch of the law, and it consolidates in one jurisdiction many complex incidentals of real property which have been scattered piecemeal about the Statute-book.[16] It is a well-constituted body in that it combines judiciously the legal and expert elements, which play almost equal parts in all these questions.

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[11] On some aspects of their working, see Noel A. D. Willshire in *Administrative Tribunals at Work* (ed. Pollard), 79 *et seq.*

[12] For a description of the extensive jurisdiction, see Sir William Fitzgerald (Chairman), " The Lands Tribunal," *British Journal of Administrative Law*, Sept. 1955, 47.

[13] S.I. 1950, No. 513.

### *Rent Restriction*

With an exception to be mentioned presently, rent restriction of unfurnished houses has not, so far, been entrusted to any special tribunals, and the prolific legal conundrums which this branch of the law has fathered have been one of the most tormenting tasks of the ordinary judicature beginning with the county courts. The Housing Repairs and Rents Act, 1954 (ss. 25 and 26), does vest in local authorities a serious function which may properly be called judicial—*viz.*, the power to issue or to withhold a certificate, at the instance of the tenant, that the landlord has not complied with the statutory conditions which entitle him to an increase of rent; but this power is subject to review by the county court. A different principle has been applied to furnished tenancies. The Furnished Houses (Rent Control) Act, 1946, set up tribunals for the regulation of furnished rentals. They are in many respects a new departure in our administrative law and certain features of them are so striking that I will leave them for fuller consideration later (*post*, p. 86). Their jurisdiction was extended by the Landlord and Tenant (Rent Control) Act, 1949, to include the fixing of standard rents for unfurnished lettings entered into for the first time after September 1, 1939,[17] and from their adjudication there is no appeal. These provisions were made originally for a limited experimental period, but have been renewed annually up to the present time, and indeed the jurisdiction has again been supplemented by the Housing Repairs and Rents Act, 1954, for by sections 24 and 40 of that statute the tribunals are charged with the duty of determining what increase of rent can be claimed by a landlord for contractual (and possibly non-contractual) services supplied by him on a post-1939 tenancy.

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[14] S.I. 1952, No. 161. For other extensions under various recent Acts, see Sir William Fitzgerald, *loc. cit.*, 50.

[15] On a case stated at the instance of the rating authority it was held in *Ellerby* v. *March* [1954] 2 Q.B. 357 that when the ratepayer is the appellant, the tribunal is limited to the issues raised by the appellant and cannot consider evidence by the respondent introduced with the intention of increasing the valuation assessed by the local Valuation Court.

[16] Its jurisdiction is limited to the causes specified in the Act, and of course it does not cover the whole field of rating, many aspects of which are still subject to the jurisdiction of the ordinary courts and continue to swell a large body of case-law.

### *The London Building Tribunal*

The vast congestion of London has created the necessity for a strict control of building in the metropolitan area, and this is governed partly by numerous by-laws of the London County Council and, more generally, by the London Building Acts, 1930–1939. These have repealed an Act of 1894, which first created the London Building Tribunal, as a result of much dissatisfaction with various rulings of the London County Council under its then statutory powers. The tribunal consists of three members, a chairman of legal qualifications appointed by the Home Secretary and two others drawn from a panel of specialists in various branches of building. It has jurisdiction over a large miscellany of technical matters of design and construction. Its decisions are final on all questions of fact, but points of law are appealable to the High Court on case stated. The tribunal is highly respected and appeals from it seem to be rare—I can find no reported instance.

## LAND: AGRICULTURE

Agriculture in this country is now under extremely strict governmental control and the farmer has become virtually a State servant. The system which has been established, and which is largely managerial at the centre, comprises many different authorities and sub-departments, the intricacy of which was brought into relief in the Crichel Down inquiry. A national agricultural system cannot be a simple matter manageable by a few hands; but here, as in the National Health Service, it is a question whether ingenuity of administration has not overreached itself.

Among a pullulating school of legislative and sub-legislative minnows, the Tritons are the Agriculture Act, 1947 and the Agricultural Holdings Act, 1948, as amended and supplemented in various particulars, but not in general policy, by the Agriculture (Miscellaneous Provisions) Act, 1954. I say nothing here of the various executive, advisory and research agencies which have been attached to agriculture. The chief of these is the Agricultural Land Commission, which is a public corporation and the delegate of the Minister for the management of agricultural lands vested in him. Of the judicial organs concerned—apart from the numerous judicial functions exercised by the Minister through his hearing officers—the principal are the County Agricultural Executive Committees and the Agricultural Lands Tribunals (to be distinguished from the Lands Tribunal already mentioned).

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[17] The reason being that *first* lettings after that date are matters of private agreement, not subject to the statutory restrictions.

### *Agricultural Executive Committees*

These latter are successors to the local bodies, bearing the title " War " instead of " County," which were established as an emergency measure; they were dissolved by the Act of 1947, but under their new style have continued, by virtue of the same statute, to perform much the same duties as before. As their name implies, they are principally executive, but in that capacity they are also inspectorial (in the opinion of some, inquisitorial) and they are the delegates of the Minister " to promote agricultural development and efficiency by such means as the Minister may direct " and to exercise certain of his functions. They are therefore powerful local bodies and it is through them that the Minister is apprised of bad husbandry or other defaults which may lead to supervision orders or, in the extreme case, dispossession. Each committee consists of not more than five members appointed by the Minister and seven members drawn from a panel nominated by and representing farmers, workers and owners of agricultural land.[18] The chairman and deputy chairman are nominated by the Minister.

It is not doubted that these local committees have done useful and conscientious work, especially during the war, and I suppose, though I have not enough expert knowledge or evidence to know, that on the whole they have stimulated efficiency and production. The obvious objection to them is that they consist largely of neighbours of the defaulter, and, without attributing anything but honest intentions to the vast majority of committee members, nobody can fail to see the opportunities for questionable or misguided personal motives in such a situation. It is inevitable, also, that individual farmers should sometimes vigorously dissent from the directions which are given to them about the use of their land, the sowing of crops, and so forth. In a conflict of that kind, it is impossible for anybody who lacks expert knowledge to judge the rights and wrongs; but the complaints have been loud and numerous, and it is difficult to believe that they are all unjustified. The Farmers' and Smallholders' Association has constantly called attention to cases of hardship and in at least one instance [19] it organised a petition which induced the Minister to revoke a dispossession and a supervision order. Strong feeling has been evinced particularly because hearings of complaints before Estates Management Sub-Committees are in private, and because there is no appeal against Committee directions, however misguided they may seem to the recipient of them, while if he disobeys he is liable to criminal prosecution. Dr. Jackson regards it as "inescapable" that "the committee has elements of the policeman, prosecutor, judge and (subject to appeal) executioner," and he sees no satisfactory way of separating these functions. This Hydra is indeed, in Dr. Jackson's words, "a new type of public agency." I cannot believe that many Englishmen wish to see it imitated in other spheres, even if agriculturists have felt obliged to accept it.[20]

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[18] The operative body for some purposes—*e.g.*, the important duty of hearing representations by a farmer against a proposed supervision order—may be merely a sub-committee: *Reg.* v. *Minister of Agriculture, ex p. Graham* [1955] 2 Q.B. 140. For a valuable account of the functions and procedure of the Committees, see R. M. Jackson (himself a Committee member), in 68 L.Q.R. (July, 1952), 363.

Grave reflections on the methods of the Ministry and of an Agricultural Executive Committee were made in the case of *Odlum* v. *Stratton*,[1] to which we must now refer. This was a trial of great length and expense in the High Court before Atkinson J. and judgment was delivered on July 29, 1946.

> Mr. George Odlum was the owner, since 1926, of a farm in Wiltshire, where he specialised in breeding Friesian cattle. His was one of the best herds of its kind in the country, and perhaps in the world; at all events, it was famous among all cattle-breeders at home and abroad. In order to maintain it in proper condition, it was necessary to grow on the farm a certain amount of forage, especially since, during the war, imported feeding-stuffs were scarce and strictly rationed. Mr. Odlum's herd was a prolific producer of milk of the first quality.
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> When the farm came under the jurisdiction of the County Committee, Mr. Odlum received repeated instructions to put more of his land under grain of various kinds. He was able to show that some of these instructions were misconceived, but he

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[19] That of the Rowsell brothers, farmers in Essex, in September, 1953. Details are given in Newsletter No. 2 (October 1, 1953) of the Association.

[20] Friends of standing and experience in agriculture inform me (whether accurately or not I do not know) that in some districts the Committees have met with such a resistance of public opinion that they have lost much of their authority.

[1] Unreported except by the *Wiltshire Gazette*; see *post*, p. 33.

obeyed them, recognising the necessity in time of war for the production of grain and root foods. He urged, however, the importance of the supply of milk of the highest quality and repeatedly asked for permission to grow forage for his herd, in the proportion of one acre for every two acres of grain. He was refused any permission to grow forage. Consequently, he had to sell a large part of his famous herd, reducing it from 217 to 57.

Here it should be interposed that subsequently the Ministry urged on County Committees the necessity for maintaining more cattle for milk production. It followed that the policy of the Wiltshire Committee in insisting so rigidly on grain as against milk was wrong, and according to Atkinson J., the Committee then did all in its power to put the blame for the misjudgment on Mr. Odlum.

Although Mr. Odlum had obeyed all the Committee's instructions, with trifling and necessary exceptions, the fact that he had made certain frank representations and objections (which all proved to be well-founded) earned him the reputation of an " obstructionist " and he incurred the violent hostility of certain representatives of authority. To what lengths this animosity was carried is fully and scathingly exposed in the judgment of Atkinson J.

In 1942 Mr. Odlum retired from the unequal contest and sold his farm with its remaining head of cattle. The purchaser was the then Minister of Agriculture, Mr. R. S. Hudson (now Lord Hudson). The only complaint which he made of the farm, as he bought it, was that there were *not enough cattle on it, and not enough cultivation of forage*. He was more fortunate than his predecessor in obtaining permissions and assistance which had been consistently refused to Mr. Odlum, *e.g.*, for growing forage, for drainage and other farm works. The judge made some sharp comments on this aspect of the case.

In August, 1943, thirteen months after the sale, the Ministry gave instructions for a party of journalists and a representative of the B.B.C. to spend a day visiting farms in Wiltshire. The arrangements were made by a Mr. Price, the Agricultural Organiser and Chief Executive Officer for the County Committee. The journalists were supplied with a " hand-out " and an itinerary. The latter contained these words: " 4.30 p.m. Then to Mr. R. Hudson's farm at Manningford. . . . This farm was taken over last summer by Mr. Hudson, and was in very poor condition, but is now showing excellent crops."

This was the only reference in the itinerary to a named farm,

> out of some 5,000 in the county. The learned trial judge said several times that the object of the journalistic excursion was " to boost the Minister."
>
> Mr. Odlum, considering the reference which has been quoted to be defamatory, issued a writ for libel. The defendant, Mr. Stratton, was Chairman of the Wiltshire Committee; he had nothing to do personally with the arrangements for the journalists, but he accepted full responsibility for publication of the words complained of and became the nominal defendant. The real defendant was, of course, the Ministry, as was shown by the fact that Mr. Stratton was indemnified against his costs—to the " amazement " of the learned judge that the public should have to pay the defendant's costs.
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> From the beginning, the Ministry claimed privilege for a large number of relevant documents, greatly embarrassing the plaintiff in the presentation of his case. The judge commented with asperity on the grounds of " public interest " advanced for this suppression, and in one instance he declared that the pretended ground of " public interest " was simply " not true."

Since this was an ordinary High Court action for damages, it does not appear in the *Law Reports*, and I am indebted for my acquaintance with it to a contemporary report in the *Wiltshire Gazette*. A verbatim report of the whole proceedings was also published in a separate volume by the office of the same newspaper. Considerations of space prevent me from reproducing the whole judgment here, which I regret, for it is worthy of the attention of all students of our agricultural controls, our administrative methods, and our " public relations." The judge's strictures on some of the " untrue " evidence of certain defence witnesses, on the whole attitude of the authorities towards Mr. Odlum, and on the attacks " of the most disgraceful kind " which were made on him both before and during the trial, were very outspoken, though, as he indicated at the end of his judgment, not all that he might have said. He awarded £500 damages. There was no appeal. In the opinion of the present writer, *Odlum* v. *Stratton* leaves a worse taste in the mouth than the Crichel Down affair, which attracted far more publicity. So, I believe, it might have proved if there had been political agitation and an official inquiry; but these did not happen.

### *The Agricultural Land Tribunals*

The Agricultural Land Tribunals were established by the Act of 1947 [2] and are governed, as to procedure, by a detailed code of regulations.[3] The country is divided into eight agricultural Provinces, each having one tribunal except the largest (Yorkshire and Lancashire) which have two. The chairman, being a barrister or solicitor of not less than seven years' standing, is appointed by the Lord Chancellor for a renewable period of three years. The two other members of each tribunal were formerly appointed by the Minister of Agriculture from panels of representatives of farmers and landowners.[4] The Agriculture (Miscellaneous Provisions) Act, 1954 (First Schedule) provides that representative panels are to be appointed henceforth by the Lord Chancellor, and that for each reference the two agricultural members are to be nominated personally by the chairman.[5] There may also be, when necessary, surveyor assessors.

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[2] According to a well-informed writer in the *British Journal of Administrative Law*, May, 1954, p. 3 (my sole authority on this point) they were preceded by Dispossession Appeals Tribunals which the Minister of Agriculture set up on his

Briefly—for each of these heads involves many technical questions [6]—the principal matters covered by the appellate jurisdiction of the Agricultural Land Tribunal are these: (1) orders by the Minister for the provision of "fixed equipment" required, or alleged to be required, for efficient husbandry; (2) applications by the owner for dispossession of the occupier of an agricultural tenancy, or *vice versa*; (3) dispossession and compulsory purchase, or other disposition of all or part of the land, by the Minister on the grounds of bad husbandry or for reasons of different and better use of the land; (4) notices to quit by either landlord or tenant, as governed by the Agricultural Holdings Act, 1948.[7] It will be seen that the jurisdiction is far-reaching and of great moment to farmers, and it has been equally authoritative with the administration, for by the Act of 1947 its determinations in most respects were made binding on the Minister, who was required to give effect to them without further ado.

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own initiative in 1946. They consisted of a legal chairman and two members appointed by the Minister. They were, no doubt, better than nothing as a safeguard for the dispossessed farmer, but they seem to have been purely departmental creations with no binding powers. They disappeared, being no longer necessary, with the Act of 1947.

[3] S.I. 1954, No. 1138 consolidates all previous procedural rules and is an elaborate code.

[4] In practice, they are representatives of the National Farmers' Union and the Country Landowners' Association.

[5] This followed, out of abundant caution, the case of *Woollett* v. *Minister of Agriculture*, from which it appeared that a practice had grown up in some places of the clerk to the tribunal, without reference to the chairman, inviting members of the panels to attend sessions. Stable J. ([1954] 1 W.L.R. 1149) held that the clerk was not the delegate of the Minister for this purpose, and that his unauthorised action was not a mere "defect" of procedure but vitiated the whole proceedings to the extent of rendering them a nullity. This decision was reversed by the Court of Appeal ([1955] 1 Q.B. 103), but on embarrassingly various grounds, and the amendment made by the Act of 1954 was doubtless intended to put the procedure beyond doubt.

[6] For a more detailed description, see the anonymous article already mentioned, "Agricultural Land Tribunals," in *The British Journal of Administrative Law*, May, 1954.

[7] In this respect now supplemented by the Act of 1954, s. 7.

They were, indeed, binding on everybody, for during the passage of the Act of 1947 its sponsors rejected a proposed amendment providing for appeal from the tribunal to the High Court. This, however, has now been provided by the Act of 1954 (s. 6). The reform was accelerated, if not caused, by public concern about *Woollett's* case, *ubi sup.*, in which the plaintiff had been constrained to resort to a highly technical (and unsuccessful) cause of action in order to bring to justice what a large section of public opinion considered to be grave hardship and unhandsome treatment. The appeal is on points of law only and may be taken by case stated to the High Court by any party to the proceedings, either before or after the tribunal has given its decision.

### *Other Agricultural Authorities*

All these tribunals are concerned with the use of land and with production from it; the marketing of the products is another branch of agriculture which is too complex to be considered within these limits. There are throughout the whole extent of agricultural law many forms of objections, representations, applications and inquiries which would fill a volume—in short, nowhere is administrative law more active. There are also numerous examples of what may be called judicial by-products—for instance, by the combined effect of the Food and Drugs Act, 1938, and the Food and Drugs (Milk and Dairies) Act, 1944 (see now Food and Drugs Act, 1955), there are elaborate provisions for tribunals concerned with the registration of dairies. These bodies were formerly appointed by the Home Secretary, but since 1944 by the Minister of Agriculture.

## TRANSPORT

We shall refer later (p. 77) to the curiously uneven appellate jurisdiction in respect of different kinds of road transport licences, and we may now mention the principal tribunals concerned in this matter.

### *Licensing Authorities*

By virtue of the Road Traffic Act, 1930, and regulations made thereunder, the country is divided into ten areas, each with a body of three Commissioners [8] who are responsible for the issue of licences for public service vehicles—*i.e.*, passenger road services—and for the different grades of licences for goods vehicles. The chairmen are appointed by the Minister of Transport,[9] and the other two members from panels nominated by local authorities of county and borough.[10] In the metropolitan area there is a single Traffic Commissioner. The chairmen are whole-time officials, not necessarily lawyers, the other members part-time. Sessions are public and legal representation is allowed. The grant of these licences is subject to many statutory conditions and it is frequently opposed by local authorities and rival undertakings, so that these tribunals are kept very busy.

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[8] So called originally, but now, by the Transport Act, 1947, " licensing authorities for public service vehicles and goods vehicles." This distinguishes them from the Transport Commission itself, which has quite different functions as a public corporation.

### *The Transport Tribunal*

Appeals concerning road service licences lie to the Minister, but those arising from applications for road haulage (goods vehicles) licences now lie to the Transport Tribunal. They are conducted under a strict and detailed code of procedure,[11] very similar to that of the High Court, and they are by way of complete rehearing. This court consists of a chairman of legal qualifications, a person of transport experience and another of commercial experience. Sessions are public; appeal lies to the High Court on points of law.[11]

Its appellate jurisdiction is only a small part of the functions of the Transport Tribunal. Since the nationalisation of most of the means of public conveyance, this new creation has absorbed nearly all the responsibilities of those courts of pious memory—early and respected models of tribunals of mixed legal and expert elements—the Railway and Canal Commission and the Railway Rates Tribunal; and it also supplants the licensing Appeal Tribunal which was established by the Road and Rail Traffic Act, 1933, together with the appellate jurisdiction which, under a series of old transport statutes, formerly lay to the High Court (s. 74). I do not pause here to consider the other extensive duties—*e.g.*, in relation to harbours and canals—of this body; but let us note in passing that it is a tribunal of an interesting type in some aspects of it, for its functions go far beyond the merely judicial, especially in its review, which is decisive, of charges schemes prepared by the Transport Commission.[12] Its administrative character in this particular is underlined by the fact that it reports annually to the Minister of Transport, who is required to lay its report before Parliament. The regulation of freight rates and other transport charges and facilities is, of course, a matter of the greatest importance to industry, to the finance of the Transport Commission, and to the public generally.

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[9] Formerly for seven years, but, by the Chairmen of Traffic Commissioners, etc., Act, 1937, during His [Her] Majesty's pleasure.

[10] There have been various complaints in the House of Commons about some of the nominations by local authorities: see H.C. Deb., Jan. 27, Feb. 4, Feb. 10 and Feb. 17, 1937 (Vol. 319, cols. 956 and 1802, Vol. 320, cols. 401 and 1186).

[11] The procedural code (S.I. 1949, No. 989) contains sixty-seven regulations and a schedule. The form of appeal provided by Reg. 60 is a curious example of legislation by reference. It sends the reader back to s. 17 of the Railway and Canal Traffic Act, 1888, s. 26 of the Railways Act, 1921 (which applied to the Railway Rates Tribunal the same form of appeal), and para. 5 of the Tenth Schedule of the Transport Act, 1947. Going to the source in 1888, we find that an appeal lies to " a superior court of appeal " on fact but not on law, but with the interesting proviso (s. 17 (4) ) that " the court of appeal may draw all such inferences as are not inconsistent with the facts expressly found, and are necessary for determining the question of law." The decision of the Court of Appeal is final, except that if there is a difference of opinion leave may be given to appeal to the House of Lords. Decisions of the tribunal are expressly exempt from certiorari, prohibition or injunction. It is difficult to understand why these provisions, or some of them, could not have been newly drafted in the Act of 1947. They seem to be antiquated, the provision about appeal to the House of Lords is unusual and (I submit) unnecessary, and there is no obvious reason why the tribunal should not be subject to the prerogative orders.

## OTHER LICENSING JURISDICTION

Intoxicating liquor and transport are the two forms of licensing most familiar to the public; but there are many other kinds of vocations and enterprises which can be carried on only under licence or registration—for example, pawnbrokers, pedlars, " offensive trades " (including fish and chips and tripe-boiling), and manufacturers (to take two extremes) of explosives and of ice cream. In most such cases there is appeal against refusal of licence or registration, but it would be superfluous to discuss all the details here.

## INDUSTRIAL ARBITRATION

Parliamentary attempts to settle, or assist in settling, industrial disputes date back at least 130 years (the Workmen's Arbitration Act, 1824),[13] and in comparatively modern times the Conciliation Act, 1896 (provisions of which are still in force) was a *fin-de-siècle* attempt to give statutory powers to voluntary conciliation boards and to the Board of Trade in industrial disputes. Today there is a vast spread of wages boards, Whitley Councils, committees, inquiries and investigations throughout the whole field of labour, apart from the multitudinous statutory provisions which govern particular industries. Of central and permanent judicial bodies in this field the most important are the Industrial Court, for voluntary arbitration between the parties in dispute, established by the Industrial Courts Act, 1919; and the Industrial Disputes Tribunal, which was set up during the war under the Defence Regulations (Reg. 58AA).[14] But these lie in the special field of industrial relations, and a discussion of their jurisdiction, interesting and important though it is, would take us too far afield.

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[12] *Scilicet*, this department of its duties is also largely judicial, since in the consideration of charges schemes the tribunal hears many applications and objections by different kinds of interested parties, including local authorities.

[13] There had already been various Acts, dating from the 18th century, which made a hesitating attempt to provide arbitration in the cotton industry. Most of the early industrial acts, however—apart from the many ancient ones about wages, service, apprenticeship, etc.—aimed at preventing " illegal combinations " of workers.

## NATIONAL SERVICE AND CLAIMS ARISING FROM WAR

Conscription and war, with all their *sequelae*, have created the necessity for judicial bodies of many different kinds to decide claims affecting both person and property. The National Service Acts, 1939–1947, are consolidated by the Act of 1948, whereby, with certain exceptions, every male British subject between the ages of eighteen and twenty-six, being ordinarily resident in Great Britain, is liable to be called up for military training for two years (the period having been extended from eighteen months by the National Service Act, 1950). The two chief types of tribunal which here command our notice are those which deal with hardship cases and with conscientious objectors.

### *Hardship Committees*

Any person liable to national service may enter a plea of hardship, which, under the Act, must be " exceptional "; postponement only, not total exemption, may be requested on this ground, and it is not granted for more than six months at a time, or, in cases of business hardship, twelve months. An application may be granted by the Minister of Labour, or it may be referred by him to a Military Service (Hardship) Committee, which consists of two members from an unemployment insurance panel and a chairman of a local tribunal. If a committee gives leave, an applicant who is dissatisfied with its decision may appeal to an umpire or deputy, who sits with two assessors appointed by the Minister; and the Minister himself has the same right of appeal. It is specially provided by the Act (s. 15 (2) ) that no determination of the Minister, or of a committee, or of an umpire or deputy-umpire " shall be called in question in any court of law." Lay or legal representation, however, is allowed at all stages. What constitutes " exceptional hardship " is of course, essentially a matter of fact and discretion, and these tribunals, which adopt a very informal and intimate procedure, have to develop their own " jurisprudence "; but the Minister gives guidance by the regulations which he has power to make, and the three chief categories of admissible hardship are the claims of persons (such as aged, disabled, or widowed parents) dependent on the applicants, difficulties of maintaining a small or "one-man" business, and other special circumstances, impossible to define comprehensively. Claims are numerous, and sometimes insubstantial, but it is believed that on the whole they are treated with a judicious mixture of generosity and caution.

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[14] Not, however, without the embattled support of three Supplies and Services Acts, 1945–1951, and a Supplies and Services (Continuance) Order, 1950! (See S.I. 1951, No. 1376.) This is an interesting example of an entirely new tribunal—an experiment in conciliation—created not by Parliamentary debate but by delegated powers. It was of a very sweeping character, in as much as it revoked many provisions, made between 1940 and 1950 for Conditions of Employment and National Arbitration.

### *Conscientious Objectors*

There are three statutory grounds on which conscientious objection may be taken: (1) to registration; (2) to any form of military service, and (3) to combatant military service. In practice, the vast majority of objections are to conscription and military service of any kind. Application is made in the first instance to the Ministry and thence to a local tribunal, presided over by a county court judge, with four other members drawn from a panel of six, which must contain representatives of labour. From these bodies recourse lies to an Appellate Tribunal, which usually, but not invariably, sits in London; its legal chairman is appointed by the Lord Chancellor, and the two other members are taken from a panel of four appointed by the Minister and containing representatives of labour. Lay or legal representation is allowed and is frequently employed. The sessions are public, unless the tribunal orders otherwise in the interest of the appellant. Procedure is informal, though the tribunal has power, which it rarely uses, to take evidence on oath. The tribunals have jurisdiction to grant total exemption, to dismiss the objection, to direct the applicant to appropriate civilian work (during the war this was principally on the land, in essential distributive trades, or in humanitarian services auxiliary to war) or to the special Non-Combatant Corps of the Army. Total exemptions are comparatively rare, but the grounds of conscientious objection, which the Act refrains from specifying, have been very liberally interpreted by the tribunals—more liberally, it is believed, than in any other country. This branch of judicature, of which the present writer had long personal experience, is perhaps of more interest to the psychologist and the theologian than to the lawyer, and it has been the subject of an acute study by a philosopher, the late Professor G. C. Field [15]; but I must not be tempted into a discussion which would be both lengthy and controversial. The determinations of the Appellate Tribunal are not challengeable by any legal process. The Minister has the right to be represented before the tribunals, but in my experience he intervenes only rarely, when some important question of general principle is raised.

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[15] *Pacifism and Conscientious Objection* (Cambridge University Press, *Current Problems* Series, No. 24).

### *War Pensions*

We pass to claims arising from the consequences of war, and of these the first which suggest themselves are pensions for the victims, or their dependants, of injuries or death suffered in the armed Services. That sad (and costly) necessity was already familiar in the First World War, when it was the subject of various enactments and of a system of tribunal jurisdiction. The whole matter was revised and reconstituted by the Pensions Appeal Tribunals Act, 1943, the terms of which are somewhat extended by an amending Act of 1949. The Acts are to be read in conjunction with certain statutes [16] which refer to special pension schemes for the various Services, including the mercantile marine and civil defence.

A claim for a war pension is made to the Ministry of Pensions in the first instance. If it is rejected on any of the grounds specified in the Act of 1943 appeal lies to one of the tribunals set up by the statute and appointed by the Lord Chancellor. The constitution of these tribunals is novel and interesting. Each consists of three members; the chairman is a barrister or solicitor; there is always a medical member (two, if the appeal is only on assessment of injury), together with a " special person " who, according to the nature of the case, is likely to have relevant experience and understanding of it—an ex-officer or other rank, a sailor, a former member of the civil defence, and so on; and this person must be of the same sex as the applicant, so that a woman always sits on an appeal by a female member of the Forces. Hearings are in public, with legal representation if desired, and the procedure is informal. Except in respect of medical assessment of injury, a further appeal lies to a judge of the High Court. This, however, is only by special leave, granted either by the tribunal or, if it declines, by the judge at his discretion. The appeal is only on points of law, but in this jurisdiction it has been found particularly true that " law " often consists, not indeed of " facts " in the sense of things which are proved to have happened, but of the inferences properly to be drawn from those happenings.[17]

The award and the amount of war pensions are surrounded by questions of great difficulty—the cause and extent of the injury or the real cause of death, the " relevant service " in which disablement was sustained, aggravation or acceleration of incipient disability, contributory negligence or misconduct by the claimant, and similar questions which nearly all raise one of the most teasing problems in the law—that of cause and effect. It is very proper, then, that in such a matter there should be an appeal to the High Court, whose decision is final. Lord Justice Denning, who, before his elevation to the Court of Appeal, was the first judge nominated for this jurisdiction, has told the story of its development.[18] The decisions form a clear and coherent body of case-law, not overburdened (as in the case of the old Workmen's Compensation) with excessive refinements and distinctions, and, on the whole, humanely though not sentimentally in favour of deserving claimants.[19] The scheme of the Act of 1943 presents three valuable object-lessons: (1) the advantage of submitting debatable questions to the trained mind and the objective approach of an entirely impartial judge; (2) the advantage, for reasons of economy and *ut sit finis litium,* of reasonably limiting such appeal; (3) and the advantage, for the same reasons, of making appeal subject to special leave. It is my conviction that most " aggrieved persons " would be far more contented—or, at all events, far less discontented—by this " day in court," which cannot be the prelude to further and ruinous days, months or even years in court, than with the " final and conclusive " decision of the most conscientious civil servants or of the most impressive and carefully selected tribunal. A more extensive, but still limited, appeal exists under the Acquisition of Land (Authorisation Procedure) Act, 1946, and these two examples might well be imitated in other branches of administrative law.

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[16] The Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, the Pensions (Mercantile Marine) Act, 1942, and the Personal Injuries (Emergency Provisions) Act, 1939.

[17] See *Benmax* v. *Austin Motor Co., Ltd.* [1955] A.C. 370.

### *Disablement and Reinstatement*

War casualties of the graver kind are also assisted by the Disabled Persons (Employment) Act, 1944, which gives certain priorities to ex-Service men and women. In this branch of his duties the Minister of Labour is assisted by a National Advisory Council and local advisory committees. Post-war employment also reminds us of the provisions for reinstatement of men and women in their former vocations, after their periods of Service or training. This is governed by the National Service Act, 1948, whereby rights or claims of reinstatement in industry are referable to local committees appointed by the Minister of Labour and drawn from national insurance panels, with appeal to an umpire or deputy-umpire appointed by the Crown. Decisions of these adjudicators are binding on employers, under threat of criminal penalties. I do not know whether such prosecutions have been common, but in fourteen years' experience of summary jurisdiction I have never known of one.

### *War Damage*

As for the effects of war on real and personal property, the field of compensation is so large and complex that I fear to tread upon it.

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[18] *Freedom under the Law*, 87 *et seq.*

[19] A number of the leading cases are discussed in Robson, *op. cit.*, 502 *et seq.*

The whole matter is governed by a series of elaborate enactments and statutory instruments, the chief being the Compensation (Defence) Act, 1939, the War Damage Acts, 1941–1943, the Requisitioned Land and War Works Act, 1945–1948 and the Landlord and Tenant (Requisitioned Land) Acts, 1942–1944.

The first of this series, the Act of 1939, relates to compensation for land and other property taken by the Government under emergency powers for war purposes. For the adjudication of claims, on principles laid down in the Act, the General Claims Tribunal was created; it consists of not less than seven members, including a High Court judge, appointed by the Lord Chancellor, and it may sit in several divisions of not less than three members. There is a separate tribunal, consisting of two lawyers of Admiralty experience, with an average-adjuster or an accountant, for shipping claims.

The tribunal is given powers not far short of High Court stature in respect of witnesses, discovery of documents, costs and so forth. Its decision is final, save that an appeal on a question of law may be taken to the High Court by case stated. This provision, contained in section 7 of the Act, has given rise to a nice point of jurisdiction. In *Racecourse Betting Control Board* v. *Secretary of State for Air* [1944] Ch. 114, the appellants were owners of certain totalisator premises which were requisitioned by the Air Ministry. The compensation which they claimed, based on antecedent profits, was ten times more than the actual value of the premises at the time of requisition, and the tribunal decided in favour of the latter valuation. The basis of valuation was a matter of capital importance to many claimants, but the appeal was not by case stated—probably because both the tribunal and the High Court would have refused leave—but by application to set aside the decision for error of law on its face. The Court of Appeal held that it had no jurisdiction, on the ground that by the statute the decision of the tribunal was final except for the one recourse specified—*i.e.*, by case stated. Much of the argument turned on the question whether the tribunal was " arbitral," because, if so, there was no doubt that arbitration proceedings were subject to review by the High Court. The case is at least authority for the proposition that the determinations of a body like the General Claims Tribunal are not merely arbitral; as Lord Greene M.R. observed, they are not " awards " but " decisions." The Master of the Rolls would not go so far as to say that they were decisions of a *court*, but of a special tribunal. The difference is really only one of terminology; the adjudicating body, unless specially limited, is for all intelligible purposes within the judicial system of the land, whether we call it a tribunal or a court. The constitutional historian may demur, but a great many existing " courts " are no more immemorial in origin than tribunals.

*Racecourse Betting Control Board* v. *Secretary of State for Air* was "not followed" in *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1951] 1 K.B. 711 and [1952] 1 K.B. 338—which means, in plain language, that much of its reasoning was doubted, to the point of overruling. It is not certain, however, that the actual decision was wrong on the particular point of appeals from the General Claims Tribunal.

The other principal head of compensation is for damage caused by enemy action to land, buildings and goods. In 1941 the Government established for this purpose a national system of insurance which supplanted all private insurance schemes. A War Damage Commission was set up, which is now largely identified with the Central Land Board. The Act of 1941, together with an amending Act of 1942, was consolidated by an Act of 1943. The Commission is concerned only with insurance claims for land and buildings; personal property is under the jurisdiction of the Board of Trade. In one respect—valuation of hereditaments—a separate form of appeal is provided. Formerly it lay to special referees; but by the War Damage (Valuation Appeals) Act, 1945, it was transferred to tribunals appointed by the Lord Chancellor and consisting of barristers and persons experienced in the valuation of land. Appeal on law lies to the High Court (a judge specially nominated by the Lord Chancellor) on case stated, or to a county court for claims of less than £500.

### *War Works*

It often happened during the war that works for military purposes were done on land which was not itself requisitioned, and for damage done thereby compensation is recoverable under the Act of 1939. Circumstances may arise in which a Ministry may wish to acquire such land permanently, either to continue the works or to restore the land. Provision for this procedure is made by the Requisitioned Land and War Works Act, 1945, which establishes the War Works Commission, appointed by the Crown, until such time as it may be dissolved by the same authority. This body is a judicial tribunal in as much as it hears objections to the proposed acquisition, and the Minister concerned is bound to refer such objections to it. The Commission then makes a report, which is published and available to objectors. Save in a few specified circumstances, the Minister cannot proceed if the report is adverse to him; or, if he proposes to persist, he must place the matter before Parliament and he can then override the Commission unless either House resolves against him within forty days. This is an interesting and curious provision, to which I do not know any exact analogy.

## ECONOMIC CONTROL

### *Investment Dealers*

The machinery concerning the Registration of Business Names will be mentioned later (*post*, p. 76) and also the registration of investment dealers under the Prevention of Fraud Act, 1939 (*post*, p. 70). In the latter connection we may note that, by section 6 of the Act, if the Board of Trade refuses or revokes a licence, it is bound to give the dealer an opportunity of appealing to a tribunal consisting of a chairman and another member, both lawyers, appointed by the Lord Chancellor, and a third member, experienced in finance, who is appointed by the Treasury. The tribunal has wide powers, enforced by criminal penalties, of summoning witnesses, calling for the production of documents and taking evidence on oath. The appellant must have " reasonable opportunities for representations to be made " on his behalf; whether in practice this means oral procedure, including legal representation, I do not know. The findings of the tribunal are binding on the Board of Trade, which must not act contrary to its report. There is no provision in the Act for statement of a case on a point of law to the High Court.

### *Safeguarding of Industries*

The Safeguarding of Industries Act, 1921, introduced special import duties for the protection of certain " key " home industries, and its provisions, which were originally for a limited period, have been continued by the Finance Acts of 1926 and 1951. The responsibility for specifying the goods and commodities specially dutiable rests with the Board of Trade, but the Act of 1921 provided that an aggrieved person might appeal to a referee appointed by the Lord Chancellor. This jurisdiction was converted by the Finance Act, 1926 (s. 10 (4) ), into that of a tribunal consisting of a referee, as formerly, and two other members taken from a panel, appointed by the Board of Trade, of " persons of special scientific attainments." The decision of the tribunal, or a majority of it, is " final and conclusive."

### *Monopolies*

The Monopolies and Restrictive Practices Commission established by the Act of 1948 is a body for " investigation and report " only. It exercises judicial functions in so far as it hears oral representations by interested persons and corporations, and it has power, enforceable by penalties, to require the attendance of witnesses and the production of documents and records. But its conclusions, which are published, have no binding judicial force and are solely for the information and guidance of Parliament, the public and the Government of the day. It is, in short, essentially a fact-finding and advisory body.

### *Patents, Trade Marks and Designs*

Until 1932 patent appeals from decisions of the Comptroller-General lay to the Law Officers of the Crown—in practice, to the Solicitor-General. (This was an accident of history, since patents were originally royal grants of monopoly, and the Law Officers were advisers to the Crown in this exercise of the prerogative.) The Patents and Designs Act, 1932, transferred the jurisdiction to an Appeal Tribunal consisting of a High Court judge nominated by the Lord Chancellor, but there was an awkward duality of recourse, since in some circumstances the appellant might go to the judge-tribunal and in others direct to the High Court. By the Patents Act, 1949, all appeals from the Comptroller now go to the judge who continues to be specially nominated, and where the matter in question is refusal to grant, or decision to revoke, a patent, or a direction by the Comptroller about the disposition of rights by co-owners of a patent, appeal lies from him to the Court of Appeal.

The procedure on appeals concerning trade marks and designs is different in that it vests a considerable jurisdiction in the Board of Trade, and it will be mentioned later (p. 76).

### EDUCATIONAL

There exists *in potentia* under Part III of the Education Act, 1944, a scheme for imposing strict supervisory and " default " regulations on independent schools—*i.e.*, those schools, including the Public Schools, which are not State-aided or within the whole system of departmentally controlled education. Under this enactment it would, apparently, be possible for the Ministry of Education to call upon Eton, Winchester and other venerable institutions to pull down antiquated premises and rebuild on up-to-date, " functional " lines; or to dismiss the headmaster or any assistant master as being inefficient or unsuitable. All that is necessary is that the Minister shall be " satisfied " of the necessity for true and enlightened educational modernity as understood in Whitehall. Should the school fall under official decree, it would have a right of appeal to an Independent Schools Tribunal. Since, however, Part III of the Act has never been called into existence,[20] and since, so far as is known, there is no immediate prospect of that happening, we may refrain from imagining the operations of a hypothetical, though statutory, tribunal.

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[20] Professor Robson's indignation (*op. cit.*, 185) at this " scandal " will not be shared by those who obstinately believe that standardisation and streamlining are not the essence of education.

## THE NATIONALISED INDUSTRIES

### *Compensation Tribunals*

The nationalisation, followed by the partial denationalisation, of great industries which had previously been conducted either by private or local authority undertakers (though most of them—*e.g.*, the railways—were already under a considerable measure of State control) inevitably meant for thousands of employees changes in their conditions of service. It was therefore necessary to establish means of adjudicating upon claims for loss of employment, diminution of emoluments and pension rights. This has been done by the creation of a series of Compensation Appeal Tribunals, appointed by the Minister of Labour, and each consisting of a legally qualified chairman and two other members representing employers and employees. The tribunals are regionally distributed throughout the country. Each of the nationalising Acts made special provision for schemes of compensation,[1] for the most part by the making of regulations. The result is a great and detailed volume of Statutory Instruments covering every aspect of compensation in these various fields and it is far too complex for description here. Nor can we stay to consider the Arbitration Tribunals which have been set up to deal with many other matters of dispute in the nationalised industries besides service and superannuation claims. A decision, already mentioned, *R.* v. *Northumberland Compensation Appeal Tribunal* [1952] 1 K.B. 338, laid it down that this type of administrative tribunal is subject, within limitations, to the jurisdiction of the High Court by way of certiorari.

Needless to say, compensation is an important issue in many contexts besides the nationalised industries. For example, the Fire Services Act, 1947, decentralised the National Fire Service, which had been established during the war, and special provisions (Fifth Schedule) were necessary for compensation of officers; these also were made by Statutory Instruments. The same applies to employees affected by the Commonwealth Telegraphs Act, 1949, which, by section 8, authorises special referees for this purpose; to former employees of Approved Societies (Superannuation (Miscellaneous Provisions) Act, 1948); to rat-catchers (if we may use an old-fashioned term) affected by local authority arrangements made under the Prevention of Damage by Pests Act, 1949 (s. 25); to various kinds of water officers (River Boards Act, 1948, ss. 29–30); to aerodrome employees (Civil Aviation Act, 1949, s. 36); and to clerks and other officers affected by the

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[1] The principal enabling provisions will be found in the Coal Industry Nationalisation Act, 1946, ss. 37 and 62, and the Coal Industry Act, 1949, s. 4; the Electricity Act, 1947, ss. 54–56; the Gas Act, 1948, ss. 58, 60, 61; the Iron and Steel Act, 1949, ss. 40–42, and the Iron and Steel Act, 1953, s. 24; the National Health Service Act, 1946, ss. 67–68, and the National Health Service (Amendment) Act, 1949, s. 18; the Transport Act, 1953, ss. 27–28.

Justices of the Peace Act, 1949 (s. 42). In all these cases the matter is governed by ministerial regulations, which provide various means of appeal in case of dispute.

## MISCELLANEOUS TRIBUNALS

There are a few bodies of mixed character and functions which are difficult to place under any special classification.

### *Wireless Telegraphy*

In recent years there has been a great deal of legislation, and not a few international agreements, about wireless telegraphy. The principal statute is the Wireless Telegraphy Act, 1949. Strict regulations govern licensing, types and use of instruments, wave-lengths, interference and many other aspects of a highly technical matter. The Postmaster-General has power to forbid the use of any apparatus which does not comply with regulations, but any person under such prohibition has an appeal to a tribunal consisting of a legally qualified president appointed by the Lord Chancellor and two expert assessors appointed by the President of the Institution of Electrical Engineers. Other assessors may be added as the nature of the case may require. The Postmaster-General is bound by the findings of the tribunal, including any conditions or variations which it may impose. The tribunal is peripatetic and may sit in any locality conveniently near the apparatus in question. The Act of 1949 also establishes an Advisory Committee for wireless telegraphy. It is interesting that the Television Act, 1954, does not make provision for any appellate tribunal parallel to that of the 1949 Act.

### *Architects*

An architect who is refused registration by the Architects' Registration Council has a right of appeal to a tribunal consisting of a chairman appointed by the Lord Chancellor, a member appointed by the Minister of Housing and Local Government and one appointed by the President of the Law Society. The decision of the tribunal is expressed to be "final and conclusive," but it is subject to the rules of natural justice, and in *R.* v. *Architects' Registration Tribunal, ex p. Jaggar* [1945] 2 All E.R. 131 certiorari issued against it for admitting evidence which the appellant was not permitted to see.

### *Shipping Courts of Survey*

By various provisions of the Merchant Shipping Acts the Ministry of Transport and Civil Aviation, through its inspectors and surveyors, has power to detain ships as unsafe or unseaworthy, and to refuse clearance of an emigrant ship in certain circumstances; while all passenger ships of any size are subject to periodical inspection and must satisfy numerous statutory requirements before they can obtain a clearance declaration of survey. A shipowner who is dissatisfied with administrative action in these matters has a right of appeal to a Court of Survey, which consists of a judge and two nautical assessors. The judge is appointed by the Home Secretary, and may be either a wreck commissioner, a county court judge, a stipendiary or metropolitan magistrate, or some other fit person. Sessions are public and procedure is governed by rules made by the Lord Chancellor. The court has extensive powers of inspection and reports it conclusions to the Ministry. The owner and master of the ship have the right to be present or to be represented at the survey.

### *Foreign Compensation*

Agreements were made after the war by Great Britain with the Governments of Yugoslavia and Czechoslovakia for compensation in respect of British property affected by certain measures of those Governments. The award of their share of the compensation to individuals is committed by the Foreign Compensation Act, 1950, to a commission consisting of a chairman appointed by the Lord Chancellor and members appointed by the Home Secretary in conjunction with the Treasury. The commission is given jurisdiction in respect of any similar future agreements which may be made with foreign governments. It has full powers for requiring attendance of witnesses and production of documents and information.[2]

## SPECIAL OFFICERS

### *Commissioners of Income Tax*

Judicial functions for various purposes are vested in certain special officers. Few people know even the names of the General and Special Commissioners of Income Tax, but they are among the busiest tribunals in the country, and in the technical authority and the impartiality of their decisions they enjoy the highest reputation. There is certainly no lack of appeal in revenue questions, for in many company and commercial matters there is a preliminary reference, sometimes obligatory and sometimes optional, to a Board of Referees. The different kinds of questions which are assigned to the General and Special Commissioners, and from them to the High Court by case stated, are specified with exactitude by the Finance Acts, and it is not, perhaps, commonly realised that apart from these statutory provisions there is no *general* right of appeal against income tax demands.

[2] See S.I. 1950, Nos. 1191, 1192, 2042.

### *Commissioners of Customs and Excise*

In the other chief branch of inland revenue, customs and excise, the principal officials are the Commissioners, who are appointed by the Crown and whose functions are now governed, after a long process of legislation, by the consolidating Customs and Excise Act, 1952. Most of their duties, being purely administrative, do not now concern us, but by section 6—confirming a power which they have long possessed—they may hold inquiries, as they may " consider necessary or desirable for the purposes of any assigned matter," and they may compel attendance of witnesses and discovery of documents and may take evidence on oath, procedure in general being at their own direction. I cannot profess any knowledge of the occasions or results of these inquiries, or find any instance of their having come within the purview of the courts, as they might conceivably do on an issue of natural justice. Another power, and a very important one, exercised by the Commissioners is a good example of mixed administrative and judicial functions. The customs authorities are authorised to seize, and claim forfeiture of, prohibited or restricted imports, but before doing so they must, of course, decide that the goods in question are of a kind which sets their powers in motion. Under the Act of 1952 (Seventh Schedule) a claim against any forfeiture may be entered within a month, and the Commissioners must then take proceedings in a court of summary jurisdiction for condemnation. This entails the usual means of appeal to quarter sessions or, by case stated on a point of law, to the High Court.

### *The Registrar of Friendly Societies*

Voluntary " mutual benefit " organisations of great variety are a long-standing and remarkable feature of our community. Many of them are of considerable antiquity and the first legislation concerning friendly societies dates from the late eighteenth century.[3] When national insurance, in its different forms, was established, it was feared that these voluntary associations would lose much of their *raison d'être*, and this was a subject of acute political controversy. There was for a time some diminution in membership, but it has proved to be not nearly as marked as was feared. In 1952 at least (I have no more recent information) there were still some 14,000 friendly societies on the register, with a membership of nearly seven millions, and benefits of different kinds paid by friendly and collecting societies during that year totalled nearly £15 million. To complete the picture of this social institution, it would be necessary to give an account of many other kinds of organised " mutual benefit "—*e.g.*, in trade unions, co-operative societies, building societies, savings banks, industrial assurance and provident societies—and of the huge mass of legislation which relates to them. It is enough to say that the country teems with associations for the provision of benefits supplementary to those which are payable under compulsory State insurance.

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[3] 33 Geo. 3, c. 54 (1793): " An Act for the Encouragement and Relief of Friendly Societies."

The first authorities who attempted to regulate these voluntary activities were the justices of the peace, who were superseded in 1846 by a specially appointed barrister. It was not until 1875 that a Registry of Friendly Societies was established, and in 1896 the whole matter was regulated by the Friendly Societies Act. This is still the governing statute, though there have been numerous amending Acts, the most recent being the Friendly Societies Act, 1955. Under these enactments the registrar, who must possess either legal qualifications or experience as an assistant registrar, has extensive judicial powers in the registration of friendly societies and trade unions, satisfying himself that they comply with the numerous statutory requirements; in internal disputes within registered societies and trade unions; and in a variety of matters affecting savings banks, building societies and industrial assurance societies (with regard to the last-mentioned he assumes the special capacity of Industrial Assurance Commissioner). In some circumstances, *e.g.*, refusal to register a friendly society or trade union, appeal lies from him to the High Court; in others, such as interpretation of rules governing the much controverted political funds of a trade union, his decision is " final and conclusive."[4] Many of his other duties are arbitral and are constantly resorted to. These are ordained by a variety of statutes of which it would be tedious to give details.

## *Other Special Officers*

To describe the far-reaching managerial powers of the *Charity Commissioners* would involve a survey of legislation which extends over more than a century. We shall refer later to the functions of the *Comptroller-General of Patents, Designs and Trade Marks*. Under the Merchant Shipping Act, 1894, a *Wreck Commissioner* may be appointed by the Lord Chancellor to inquire into a shipping casualty. He has all the powers of a court of summary jurisdiction, and may also suspend or cancel a master's certificate.[5] He may have the assistance of nautical assessors. (This, it should be added, is only one of many different kinds of investigations into shipping casualties.)

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[4] Trade Union Act, 1913, s. 3. On the other hand, the fact that the Registrar has approved the rules of a trade union does not preclude their being challenged in the High Court: *Birch* v. *National Union of Railwaymen* [1950] Ch. 602.

[5] There is, curiously enough, concurrent power of " formal investigation " in courts of summary jurisdiction (Merchant Shipping Act, 1894, s. 466 (1) ) after a preliminary inquiry, but resort to it is infrequent.

In the sphere of local government great responsibilities are vested in *District Auditors*, from whose surcharges there is an awkward duality of appeal, either to the Minister of Housing and Local Government or to the court if the amount involved is less than £500, and to the court for sums above that amount. The jurisdiction is peculiar in that a surcharge of more than £500 may involve not only monetary restitution but disqualification from membership of a local authority, and also in the provision that either the Minister or the court, in certain circumstances, may exonerate the defaulter from evil intent and relieve him of personal financial responsibility.

### INQUIRIES [6]

The Blue Book, despite its reputation for dryness, is really an irrigant (and that is not a misprint for " irritant ") of the soil of our public and governmental life. Often its fate is merely to gather the dust of oblivion, but no less often it is a document of permanent constitutional value and of no small literary merit. The reports of royal commissions, select committees and many other special investigatory bodies which are constantly active among us, are a truly remarkable thesaurus of information on innumerable subjects of public importance—and not information only, but, as Professor K. C. Wheare has emphasised,[7] of education of public and political opinion. A very considerable portion of our Statute-book has been influenced, and in some instances almost entirely shaped, by reports of this kind. Other legislative projects have, for better or for worse, been strangled or indefinitely postponed by them.

In addition to these special investigations, which lie beyond our present review, there are innumerable permanent or recurrent inquiries ordained by statute in different fields of administration.[8] If the reader will refer to the index of any recent annual volume of statutes under the headings of " inquiries," " public inquiries " and " local inquiries," he will find them frequently authorised or commanded by Acts relating to all sorts of subjects. Perhaps those most familiar to the public, because most frequently reported in newspapers, are inquiries into accidents and " fatalities " in shipping, railways and civil aviation. There are a great many others of which the general public, and indeed most of the legal profession except specialists, have never heard. I do not imagine, for example, that many landowners, or many lawyers except some conveyancers, have much experience of the inquiry, concerning compulsory registration, which is contemplated by section 122 of the Land Registration Act, 1925, nor is there likely to be widespread knowledge of a public inquiry into the charges of harbour and various water transport undertakings (Transport Charges, etc. (Miscellaneous Provisions) Act, 1954) nor into coast erosion under the Coast Protection Act, 1949.

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[6] See W. A. Robson, " Public Inquiries as an Instrument of Government," *British Journal of Administrative Law*, Dec., 1954, 71.

[7] *Government by Committee*, Chap. IV.

[8] They are well summarised by Professor Robson, *British Journal of Administrative Law, loc. cit.*, 86 *et seq.*

### *Public Local Inquiries*

More familiar to all who are concerned either with local government or with ownership of real property are public local inquiries held by departmental inspectors, especially in matters of housing and town and country planning. Some of these are obligatory—the Minister cannot take administrative action without holding them; and some are facultative—the Minister may hold an inquiry, private or public, if he considers it necessary. Opinions differ about the merits of these investigations. Some of them came under sharp criticism in evidence before the Committee on Ministers' Powers. There were complaints about both the competence and the partiality of certain hearing officers.[9] The present writer is not qualified to judge, but most opinions which he has heard from learned friends and others who are experienced in these inquiries have been favourable, and sometimes highly complimentary, to the conduct and judicial quality of the proceedings. There remains the objection, however, that the findings of the hearing officer are not usually disclosed to the public or to the interested parties, and, for all they know, the inspector's conclusions may be based on imperfect appreciation of the evidence or false inferences from the established facts. This is a far greater danger than actual partiality, prepossession or bureaucratic bias, which I believe there is seldom good reason to suspect in the attitude of the hearing officers.

What is the status of these investigating bodies and what effective part do they play in administrative law? They are not courts, and nobody is bound by their decisions. Their business is to find facts and to make recommendations.

It is impossible to know how much the minds of Ministers are influenced by findings and recommendations either of inquiry or of advisory bodies, especially when they are double-distilled by further advice from permanent departmental officials. No doubt independence of mind in these matters varies greatly with individual Ministers.

It makes an unfortunate impression, however, when it is revealed that a public local inquiry has not, and was never intended to have, any influence at all on the main question for Ministerial decision. (It may, no doubt, influence him in incidental matters.) Even though an inquiry is not a court, it has many of the appurtenances of a judicial process, and indeed not a few statutory committees or tribunals of inquiry are invested with many of the imperative powers—as to witnesses, discovery, sworn testimony and so forth—of a court of law. It is therefore difficult to persuade the ordinary citizen, with his respect for the form and spirit of British judicial procedure, that the whole elaborate machinery of public local inquiry is intended solely to " inform the mind of the Minister " when it is apparent that it has no influence on the chief issue for his decision. Despite all the fine distinctions of the Court of Appeal and the House of Lords, it is not to be doubted that a procedure like that of the celebrated *Stevenage* case (*Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87), in which the Minister had made it clear in advance that no objections whatever would deter him from his main project, regrettably lowers in the eyes of the public the usefulness and prestige of administrative inquiries.

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[9] See *Minutes of Evidence* at pp. 69, 72, 79, 97, 104, 112, 115, 116, 159, 168, 189 *et seq.*, 248, 270, 278.

It seems clear that until the decision in *Robinson* v. *Minister of Town and Country Planning* (the *Plymouth* case), [1947] K.B. 702, it was generally accepted that the Minister, in considering the report from a public local inquiry under the ordinary statutory form, was acting in a quasi-judicial capacity. This clearly emerged in the debate on the Town and Country Planning Bill in 1947.[10] Objection was taken to clause 9 of the Bill, which gave the Minister power to hold consultations with any authority or person at any stage of a development plan. It was quite evident from the Minister's previous statements in the debate that he considered himself to be subject at least to the rules of natural justice as laid down in *Errington* v. *Minister of Health* [1935] 1 K.B. 249. Then, in the middle of the debate, came the decision of the Court of Appeal in the *Plymouth* case (decided under the Town and Country Planning Act, 1944), in which it was held that the Minister, in making a declaratory order for compulsory purchase, was not acting in a quasi-judicial capacity at all, could inform himself in any way he chose, and was not obliged to disclose the sources of his information. It was frankly stated by the Attorney-General (col. 1520) that the powers of the Minister under the Bill of 1947 were to be regarded in that *new* light. The same principle was applied by the House of Lords in the *Stevenage* case, on its interpretation of the New Towns Act. It is significant to observe how a doctrine of this kind gradually extends itself. During the debate on the Forestry Act, 1951,[11] an amendment, which had already been rejected in Committee, was moved concerning the

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[10] H.C. Deb., May 14, 1947 (Vol. 437, cols. 1510 *et seq.*).

[11] H.C. Deb., July 16, 1951 (Vol. 490, cols. 951 *et seq.*).

Minister of Agriculture's powers of compulsory acquisition.[12] The argument for the amendment (which, however, lapsed because it was not called) was that at a public local inquiry it was for the Minister to produce evidence for the proposed acquisition and thus to give the objectors the opportunity to cross-examine on the project and the reasons for it. The Minister, Mr. T. Williams, roundly stated that he was perfectly entitled to make up his mind beforehand and that it was then for the objectors to prove that he was wrong. This candid view of the onus of proof seems to be another jet of the "blowing off steam" which became historic in the *Stevenage* case. An interesting commentary is provided by an incident which occurred a year before the Forestry Act, 1951, was passed. The Minister had served compulsory orders on 650 acres of the Elveden Estate in Suffolk. A public local inquiry was held on the lines commended by Mr. Williams, with the onus entirely on the objectors and no opportunity for them to cross-examine. The Minister made Provisional Orders and included them in a Confirmation Bill, which was the procedure at that time.[13] The objectors petitioned against the Bill; the onus then fell upon the Minister, and he so signally failed to justify his orders that the Bill was thrown out in four minutes by the Select Committee of the House, without calling on the objectors.[14] Onus of proof is of vital importance in any judicial process; but of course if a public local inquiry is in no sense judicial or quasi-judicial, there is no proof and no onus. There is only the mind of the Minister —at all events, if the legislation is so framed and interpreted as it was for the New Towns.

The inspectors are, with rare exceptions, officials of the Department, and ever since *Local Government Board* v. *Arlidge* [1915] A.C. 120, it has been settled that objectors have no right to see their reports, though they are sometimes made available on request. It has been pointed out [15] that before the First World War, inquiries in connection with compulsory purchases, especially for housing and small holdings, were required to be held by impartial persons not in the employ of Government Departments, that the practice changed under the exigencies of the war, and that the first statute which established the present system, followed ever since, of departmental officials, was the Housing Act, 1919. Under the earlier Acts, also, the Minister's order was not final, but was in the form of Provisional Order, subject to confirmation by Parliament. In 1952 the Law Society and the Royal Institution of Chartered Surveyors presented a memorandum to the

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[12] Now contained in s. 20 of the Act of 1951, with cross-reference to the procedure prescribed in the Forestry Act, 1945, First Sched.

[13] The Forestry Act, 1951, substituted Special Procedure for Provisional Order.

[14] See letter by Lord Iveagh, *The Times*, July 26, 1951.

[15] See an article by Mr. W. Craig Henderson Q.C. in *The Sunday Times*, Feb. 2, 1947.

Lord Chancellor and the Minister of Housing and Local Government proposing that consideration might be given to the establishment of an independent inspectorate on a panel appointed by the Lord Chancellor. Other proposals urged: (1) greater promptitude in Ministerial decisions (there have been loud complaints on this score); (2) preliminary notice of Ministerial policy and the reasons for it, so that they might be open for discussion at the inquiry; (3) publication of inspectors' reports, as recommended by the Committee on Ministers' Powers; (4) the giving of reasons by the Minister for any departure from inspectors' recommendations. So far as I am aware, up to the present time these proposals have borne no fruit.[16]

### *Tribunals of Inquiry*

Besides all the various statutory committees and tribunals of inquiry, power is given by the Tribunals of Inquiry (Evidence) Act, 1921, to establish an *ad hoc* tribunal to investigate any matter " of urgent public importance." This must, however, be sanctioned by a resolution of both Houses. A special tribunal under the Act has nearly all the powers of a court of record; legal representation is allowed and the sessions are public, unless the tribunal in its discretion orders otherwise. The purpose is solely to investigate and report, and anything which follows upon the tribunal's findings is matter for political action—unless, of course, reasons emerge for civil suit against, or criminal prosecution of, individuals. It is under this statute that some of the " sensational " inquiries, such as the Lynskey Inquiry,[17] have been held.[18] By some recent statutes inquiries conducted by various other authorities [19] may be invested, at the option of a Minister, with the characteristics of a tribunal under this Act.

### *Departmental Inquiries*

Besides these special procedures, a Minister of the Crown may at any time institute an inquiry into any matter which he considers needs special investigation. This is usually done as the result of parliamentary or public agitation. An inquiry of this kind is not governed by any special rules of procedure, and theoretically it is merely for the information of the Minister; he is not bound to publish the findings of the investigating body, which may consist of one or several persons. To withhold the report, however, would create a very unfavourable impression and I am not aware that this has ever been done. In recent times the best-known example of a Ministerial investigation of this kind is the Crichel Down inquiry.

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[16] They are fully discussed in a series of articles in the *Justice of the Peace*, March 7, 14 and 21, 1953.

[17] See its Report, 1949, Cmd. 7616.

[18] A very interesting account of these *causes célèbres* is given by Professor Robson, *British Journal of Administrative Law, loc. cit.* (Dec., 1954).

[19] *e.g.*, the Agricultural Land Commission (Agriculture Act, 1947, s. 69 (2), and the White Fish Authority (Sea Fish Industry Act, 1951, s. 9).

## DOMESTIC TRIBUNALS

### *Associations*

If man was a " gregarious animal " even in the city state of Aristotle, he is infinitely more so in the complex relationships of modern societies. He is so gregarious, indeed, that in some " ideologies " both of politics and of jurisprudence he is of little significance except as a digit in a total sum. A transpontine paraphrase of Aristotle's famous description might be that man is a born " joiner." He joins for every conceivable kind of purpose, serious and trivial, sensible and senseless, and in this country a glance at any standard work of reference will show that the number of voluntary associations is as the sands of the sea. Each one must have its rules, some of them implicit and vague, many of them explicit and elaborate. They cover an immense variety of subjects and objects, but some fundamental provisions are practically universal—for example, the conditions of acceptance and expulsion and often the behaviour of members, finance, proprietary and contractual rights and obligations. Since even the best of " joiners " may sometimes transgress or dispute these regulations, internal adjudicating bodies of one kind or another are necessary to interpret and enforce them. On the whole, the policy of the law is to leave associations free to manage these affairs in their own way; but there are important restrictions on that liberty of action, for the inclusion or exclusion of a member is often a matter of vital concern to him and cannot be left entirely without legal protection.

Many groups are entirely self-made and self-governing, living in the shadowy and still imperfectly mapped territory of " unincorporated associations." Others have received definite legal recognition and are governed in part at least by statute. In this latter class the most conspicuous are naturally those which concern gainful occupations, and here the most numerous are trade unions. We have seen that these are not entirely free in their establishment and government; they must satisfy certain conditions, strictly defined by a long course of legislation, before they can be registered and thus accorded legal status. Once established, however, they are constantly exercising a domestic jurisdiction concerning the observance of their rules, and our law reports teem with appeals to the courts from their rulings.

### *The Medical Profession*

We have seen, too, that the medical profession is subject to a searching discipline imposed by the State and adjudged by a whole network of tribunals. But here there is also a further "domestic" discipline vested by statute in the General Medical Council with special reference to "infamous conduct in a professional respect"—offences not against mere rules and regulations but against professional ethics. The Council has very wide discretionary powers, and, despite many legal battles over its decisions, until quite recently[20] there was no appeal from it except for defect of natural justice. Now, by the Medical Act, 1950, s. 20, there is an appeal to the Privy Council against a decision to strike a practitioner off the register.[1] The same Act reconstitutes the membership of the Council, and transfers the disciplinary jurisdiction which formerly resided in the whole Council to a special Medical Disciplinary Committee. This consists of the President and eighteen other members of the Council, two of them being laymen, together with a legal assessor, who appears to fulfil much the same functions as the Judge-Advocate of a court-martial. The Committee has many of the powers of a court of law and detailed statutory directions are given for its procedure. It has jurisdiction over dentists as well as doctors, but, by the Dentists Acts of 1878 and 1921, this is exercised only on a report, after investigation, of the Dental Board of the United Kingdom.

### *The Legal Profession*

Among lawyers there is a sharp contrast in "domestic" jurisdiction between the two branches of the profession. There is nothing else in the country comparable to the ancient societies of the Inns of Court—once upon a time the medieval gilds bore some resemblance to them—and their disciplinary powers over their own members are practically unfettered. The jurisdiction extends to all counsel, since nobody can qualify as a barrister except as a member of one of the Inns. Determinations of the Benchers of an Inn are entirely independent of the courts, though in some circumstances there may be recourse to the Lord Chancellor and to judges of the High Court, by custom and agreement, reinforced by the wide provisions of section 34 of the Judicature Act, 1925. There does not seem to be any recent instance of this procedure.[2] The Bar has very strict standards of professional conduct and it is some tribute to its members that cases of suspension are infrequent and of disbarment extremely rare.

This is an example of a truly "domestic" jurisdiction. Solicitors, on the other hand, are subject to a professional jurisdiction which is largely governed by statute—indeed, by a whole series of statutes, particularly those passed between 1932 (the year of the principal Act) and 1941; these are comprehensively known as the "disciplinary enactments." A solicitor is an officer of the court, which for this purpose is personified by the Master of the Rolls; and before being able to pursue his profession he must be registered and furnished with a practising certificate. His professional association is the Law Society, to which he is responsible for observance of many rules of propriety and honesty. These are not merely of "domestic" provenance and authority; a number of offences, including many of a financial nature, which a solicitor may commit against both ethics and proper management are set forth in detail in the disciplinary enactments, and there may be more general and undefined allegations of misconduct. Complaints made to the Law Society are first investigated by a committee, and, if a prima facie case is disclosed, they are then referred to the Disciplinary Committee. This is a separate body,[3] of not less than three or more than nine, appointed by the Master of the Rolls from among present and past members of the Council of the Law Society. The Committee has power to strike off the rolls, to suspend, fine, and to order costs. Hearings are in private, but with full representation, and with nearly all the powers of a court with regard to evidence, oaths, discovery, etc. The actual procedure is regulated by a steady stream of Statutory Instruments. From the Committee an appeal lies to a court consisting of three judges,[4] with further recourse (by leave) to the Court of Appeal. The first of these appeals is by way of rehearing, but the Court of Appeal has laid it down that it will rarely interfere with findings of fact by the lower courts.[5] Ultimate appeal lies, by leave, to the House of Lords.

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[20] *i.e.*, for nearly a hundred years, for it was first established by the Medical Act, 1858.

[1] I do not know of any reported appeal of this kind since the Act was passed.

[2] See Hals., L. of E., 3rd ed., iii, para. 5. Most of the relevant cases are antique, and that most commonly cited, *Booreman's Case* (1641) March. 177, is so ill-reported as to be practically valueless. More instructive is Lord Mansfield's judgment in *R.* v. *Gray's Inn* (1780) 1 Doug.K.B. 339.

Solicitors, then, are under stern governance, and it is to be remembered that they differ from the other branch of the profession in another important respect—*viz.*, that they are liable to civil actions for negligence and incompetence in the performance of their duties.

### *Other Professions: The Stock Exchange*

Many other professions and occupations come under similar statutory provisions for discipline—for example, *architects* under the Architects Registration Acts, 1931–1938, *midwives* under the Midwives Act, 1951 (with appeal to the High Court), and *veterinary surgeons* under the

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[3] It is constantly referred to as "the Disciplinary Committee of the Law Society," but in fact and in law it is not in any way an organ of the Law Society but quite independent of it.

[4] Unless the Lord Chief Justice orders otherwise: Solicitors (Disciplinary Appeals) Rules, 1942 (S.I. 1942, No. 1832), r. 6.

[5] *Re A Solicitor* [1945] 1 All E.R. 315.

Veterinary Surgeons Act, 1948[6] (again with appeal to the High Court).[7] On the other hand, that very powerful body, the Committee of the *London Stock Exchange*—which exists not by any statutory authority by a private Deed of Settlement of 1875—is complete master in its own house. What little case-law exists on the subject makes it clear that there are hardly any circumstances in which the courts will interfere with the discretion of this committee. Dicta suggest that the rules of natural justice may apply to it, but that question has never, so far as is known, been settled.

### *What is " Domestic " ?*

To what extent are these adjudicating bodies " domestic "? There is an obvious difference, in point of government and redress, between membership of a society of bird-watchers, or of a social or athletic club, and membership of a trade union. There is, indeed, as we have already seen, a great difference in the administration of discipline between the profession of a solicitor and that of a barrister, and an even wider dissimilarity between the position of a medical practitioner and a member of the Stock Exchange. Much depends upon the extent and importance of the common interest which the association is intended to serve. Bird-watching may be to some people a matter of earnest concern—I seem to remember that presidency of it was the crown of a social career to Mr. Marquand's " H. M. Pulham, Esquire "; but to the profane mass of the unornithological its affairs are essentially for its own management and it would cause unkind comment if its rules and discipline were the subject of solemn judicial pronouncement. This is true of the vast majority of the multifarious associations which joiners join. But it is not true of those more elaborately organised associations which exist to protect and promote trades, industries and professions important enough to attract parliamentary attention. In these cases, the term " domestic " is merely one of convenience and the disciplinary bodies concerned are really special cases under the general law of the land. It is very rarely that, by long usage, they are so essentially " domestic " that—like the Inns of Court and the Stock Exchange—they are virtually exempt from legal control.

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[6] In this instance the Disciplinary Committee, unlike that of the Law Society, is appointed from the Council of the Royal College of Veterinary Surgeons by the Council itself, with the proviso that one member must have been appointed by the Privy Council. Disciplinary bodies also exist for chartered accountants, chartered surveyors, registered nurses and assistant nurses.

[7] An interesting list, which does not profess to be exhaustive, of domestic tribunals is given in *The British Journal of Administrative Law* for June, 1955. It includes a number of courts-martial and other disciplinary bodies in the Armed Forces, but these, with respect, do not seem to me to be rightly classified as " domestic."

### *What is "Voluntary"?*

Again, how far are these internal regulative bodies "voluntary"? We can without hesitation use that term of the bird-watchers or of an ordinary club, since nobody is obliged to join it or to remain in it if he does not like it. It may be said that nobody is obliged to adopt or continue a particular vocation, but in reality we know that the choice is not always as easy as that. A manual worker of almost any kind may not wish to belong to a trade union—and many do not—but in numerous occupations he will suffer severe disabilities if he remains outside it. It is only by a very indirect and theoretical kind of "agreement" that a man in these circumstances can be said to place himself under conditions; that notion can be carried so far that for more than a century it was said that a workman entered into an "implied agreement" to accept risks of injury through the negligence of his fellow-workmen. There is a good deal of fiction in describing the powers of marketing boards as being a "voluntary" jurisdiction so far as the individual is concerned. It is the same with the discipline in the professions; the offer, "Either do not become a doctor or accept the life-and-death judgment of the Minister" is hardly a choice of completely free will. It is because so many conditions govern so many vocations that we have heard in modern times of a reverse movement "from contract to status." It is not here argued that disciplinary and regulative conditions in special spheres are unreasonable or unnecessary; but it should be recognised that a great deal of "domestic" jurisdiction is far more than a matter of voluntary submission, like an arbitration, of limited effect. It is, like custom, law of local application, but none the less law on that account.[8]

### *Domestic Tribunals and the Courts*

If that is so, what control have the courts of law over it?[9] We have seen that there is often special provision for appeal; and if statute lays down conditions about constitution, procedure and powers, and if those conditions are neglected or infringed, then the tribunal will be subject to the ordinary means of redress for *ultra vires*, unless it is specifically exempt therefrom. Otherwise these authorities are subject to superior jurisdiction on an issue of natural justice, and with regard to the interpretation of their rules and constitution. The decision in *Lee* v. *Showmen's Guild* [1952] 2 Q.B. 329, is clear authority that the true meaning of an association's rules—*e.g.*, in that case the meaning of the expression " unfair competition "—is a matter of law on which the courts have the last word, and that any attempt to make a committee or managing body the sole and unimpeachable interpreter of rules which govern membership is contrary to public policy and of no effect. In the case last mentioned a man's livelihood was at stake, and the court attached great importance to that fact; but the principle is not confined to vocational bodies, and in *Baker* v. *Jones* [1954] 1 W.L.R. 1005, Lynskey J. applied it without hesitation to a purely voluntary and unincorporated association—the British Amateur Weightlifters' Association, than which, I conceive, nothing could be more voluntary. We have seen that the principle is applicable to the rules of a trade union: *Birch* v. *National Union of Railwaymen, ante*, p. 50.

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[8] Whether or not domestic jurisdiction is necessarily based on contract was the occasion of a sharp difference of judicial opinion in *Abbott* v. *Sullivan* [1952] 1 K.B. 189. See Denning L.J. in *Lee* v. *Showmen's Guild, ubi infra.*

[9] Hereon see Lord Justice Morris, "The Courts and Domestic Tribunals," 69 L.Q.R. (1953) 318.

### TRADE ASSOCIATIONS

The tribunals which we have been considering are " domestic " in the sense that their jurisdiction is exercised over a limited number of persons who are associated for a common purpose. But what if it is exercised over other persons as well who have never consented, either expressly or by implication, to submit to it? This is the question which has arisen, and which has been much in the public mind,[10] about tribunals established by numerous trade associations for the enforcement of certain conditions of trading—comprehensively described as " collective discrimination "—and especially the maintenance of minimum resale prices. It is well known that if an individual trader violated one of these conditions, and in particular if he was deemed to be guilty of " price cutting," he might be subjected to various penalties, including fines and boycott by means of a " stop list " or removal from an " approved list." The embargo had the effect that no member of the association would deal with him, he would thus be cut off from supplies, and he might be commercially ruined. These practices have occasioned not only much public uneasiness, but a large and obscure body of case-law, especially in the House of Lords, about trade combination and conspiracy. If, however, the Restrictive Trade Practices Bill, 1956, becomes law in its present or amended form, it seems that these " tribunals " will no longer be able to function, and it would therefore now be beside the purpose to discuss the problems which they have raised in the past.

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[10] Though not strictly within the terms of reference, these " tribunals " came under review by the Monopolies Commission in its Report on Collective Discrimination (1955, Cmd. 9504; see especially paras. 153–155 and 168) and a good deal of evidence was taken about them. The observations of the Commission were, on the whole, unfavourable, though three members registered minority dissent from that view.

### ADVISORY COMMITTEES

We must mention here a kind of administrative auxiliary body which stands somewhere between an executive organ and a tribunal. Advisory Committees have multiplied at an even greater rate than tribunals. Their numbers, if we reckon both central and local bodies, are now so large that nobody seems able to calculate them. Professor Wheare,[11] basing himself on an official answer given in 1949, tells us that the number of central and national Advisory Committees was then 700; but the Government shrank in dismay from the " arduous labour " of estimating the number of local bodies. Every Ministerial sun has numerous satellites to advise him, amounting even, in the case of the Lord President of the Council, to a round hundred. The " jurisdiction," if that inaccurate term may be allowed, ranges from that of the medical experts who advise on the fate of an " accused " doctor under the National Health Service to the assembled *expertise* of the Kippering Advisory Committee or the Consultative Conference on Rabbits and Poultry. Even as no sparrow falls to the ground save by the wisdom of Divine Providence, so no kipper comes to the breakfast table save by the wisdom of an Advisory Committee.

If statesmanship cannot be statesmanlike amid this wealth of advice, it surely can never achieve wisdom on this earth. Plato himself could not have asked for more. But have we not all heard warnings, from our youth up, about multiplicity of counsel? Again one cannot refrain from wondering how it is possible to man all these bodies with persons who not only possess the necessary amount of special knowledge but who are capable of giving sagacious counsel—for the one qualification is of little value without the other. Once more, when I consider the number of individuals among us who are competent to adjudge contested issues, together with those who are competent to advise on matters of " social control," I stand in awe and admiration before the collective talents of the British people.

A large number of these bodies are set up *mero motu* by Departments and other authorities, for of course there is nothing to prevent anybody assembling an Advisory Committee about anything. Many others, however, are created by statute, and it is only with these, and with their relevance to executive powers and delegated legislation, that we are at present concerned. They are a repeating decimal in most recent statutes of extensive scope. Examples of them occur under such enactments as the Education Act, 1944, the Insurance Acts and the Children Act, 1948. There are said to be over eighty committees advising the National Assistance Board, and a comparable number for National Insurance.[12] But the device was becoming frequent in statutes much earlier than these. Thus, under the War Pensions Act, 1921, a Central Advisory Committee was set up. Under the well-known Reg. 18B, an Advisory Committee reported to the Home Secretary on cases of detention, and the Minister was required periodically to report to the House the number of cases in which he had not accepted the recommendations of the Committee. The Ministry of Transport and Civil Aviation constantly consults committees in connection with technical shipping matters, and especially the standing Merchant Shipping Advisory Committee, which contains a wide representation of all shipping interests. An Advisory Committee was established under the Therapeutic Substances Act, 1925, and others under the Housing Act, 1935, the Cotton Spinning Industry Act, 1936, the Unemployment Insurance (No. 3) Act, 1931, the Road and Rail Traffic Act, 1933; a Central Housing Advisory Committee under the Housing Act, 1936, a National Advisory Council under the Physical Training and Recreation Act, 1937, a Poisons Board, with functions similar to those of an Advisory Committee, under the Pharmacy and Poisons Act, 1933; and many others.

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[11] *Government by Committee*, 46, *q.v.* (Chap. III) on the whole subject. An earlier survey, now somewhat out of date but still valuable, is to be found in *Advisory Bodies: a Study of their Uses in Relation to Central Government, 1919–1939* (ed. Vernon & Mansergh). See also Sir Frederick Pollock, *Essays in the Law*, " Government by Committees in England."

A Minister is frequently required to consult an advisory body before taking a decision, though he is not, of course, bound to accept its advice. Thus the London Traffic Act, 1924, provided that the Minister of Transport should refer a number of specified matters to the Advisory Committee, and a decision taken without this preliminary would be null; it has even been attacked (unsuccessfully) on the ground that the Committee was improperly constituted.[13] An Advisory Committee with special functions is constituted under the Import Duties Act, 1932. It consists of not less than three and not more than six members appointed by the Treasury, and its principal function is to hear representations about the working of the Act and to make recommendations to the Treasury. Its recommendations are published. It has power to require the production of returns, documents and other information, and to compel the attendance of witnesses, whom it can examine on oath, under a penalty not exceeding £50, or £200 for a second offence. A witness can also be required to attend before a "person authorised" by the Committee, but only if the Committee "are satisfied" that the inquiry by this means "can be conducted more conveniently and more efficiently" than by a hearing before the Committee itself. This provision is probably surplusage, because it is doubtful whether there are any legal means of inquiry into the reasons by which the Committee "are satisfied." Here we seem to have a considerable blend of the judicial and the advisory, and the same is true of many other advisory bodies which hold " hearings."

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[12] Wheare, *op. cit.*, 48.

[13] *May* v. *Beattie* [1927] 2 K.B. 353.

It goes without saying, however, that the recommendations of an Advisory Committee have no actual judicial or quasi-judicial validity, though doubtless a statutory Advisory Committee would be subject to mandamus to make it perform its functions. And such bodies have this relevance to judicial remedies, that if a Minister is required by statute to consult an Advisory Committee and omits to do so, or if he neglects any requirements of procedure which may be prescribed, this will expose him to certiorari or prohibition for *ultra vires*.

The status and value of these advisory bodies is difficult to assess, because for the most part both their deliberations and their persuasive effect are not made public. This is not invariably so; a few committees publish special or periodical reports, and there is an outstanding exception, to which I have referred (*ante*, p. 22), under the National Insurance Acts. But in general it is impossible to ascertain how and why an Advisory Committee has reached its conclusions, what form they take, and to what extent they influence the ultimate decision. No doubt Ministers and their permanent officials differ in their attitudes towards them; it is certain at least that recommendations are not always or automatically accepted, and one reason for this, among others, is that there must often be differences of opinion on the committees themselves and probably, as a result, vague or hesitating recommendations; but in such matters one can merely guess. Before the Committee on Ministers' Powers most of the departmental evidence acknowledged indebtedness to the advice received, though one witness mentioned a view, which he did not necessarily support, that the committees were merely devices for salving the Minister's conscience [14]—or, shall we say, for the dark hues of the smoke-screen or the light ones of white-washing, according to one's choice of colours and metaphors. This is an aspect on which Professor Wheare touches, pointing out the danger that " members of advisory committees may become a kind of private appendage of the department, bound to secrecy." Persons of less fastidious vocabulary than Professor Wheare might say that they become official " stooges." This is a political question on which I express only the conjectural opinion that this seems probable enough in view of the problem, already mentioned, of selection and appointment of personnel. Also, if such auxiliary and sympathetic elements are enlisted, it is clear that the hand which constructs Statutory Instruments will be a more free hand than if advice were strictly impartial.

It has already been noted (*ante*, p. 22) that an exceptional expedient, which gives an Advisory Committee more power than most, is adopted by the National Insurance Acts, inasmuch as the Minister is required to submit draft regulations to an Advisory Committee; and I have ventured to express the opinion that this is one of the most useful functions which a well-selected and really expert Advisory Committee can discharge. It is specially provided that when the Minister ultimately lays his regulations before Parliament, he must also lay the Advisory Committee's report, with a statement showing how far he has or has not given effect to the Committee's recommendations. This is a most salutary means (there was an analogy under Reg. 18B) for ensuring, or at least stimulating, parliamentary attention and debate, but it has created a certain difficulty for the Select Committee on Statutory Instruments. In its Special Report (July 28, 1948), the Committee observed that it had

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[14] Earl Russell, *Minutes of Evidence*, 244, Q. 3309.

> " not always found it easy to discover how each recommendation has been treated; the original draft is not before them and the alterations are difficult to trace. If it were possible . . . to set out a brief tabular summary of the recommendations of the Committee and to indicate categorically, item by item, how and where the department has met them or why it has not met them, it would naturally be easier to follow what has been done."

Whether or not this suggestion has been adopted I do not know, but the interest of the Select Committee indicates the importance of the part which an Advisory Committee of this kind can play in the processes of delegated legislation.

## MINISTERIAL JURISDICTION

### Judicial and Managerial Powers

Judicial functions exercised by Ministers are numerous and it will not be practicable to give more than a few examples here. We shall be concerned first with situations in which a Minister or his representative is acting judicially " at first instance "—*i.e.*, he is deciding a dispute or an application which has had no previous hearing by any other authority and in which his determination is in many instances, though not in all, final. It is difficult to classify these determinations with precision, but roughly they may be divided into four main categories.

### *Original Judicial Powers*

A complete discretion is vested in the Home Secretary with regard to the grant to an alien of *naturalisation* and its withdrawal, though in the latter case the Minister is assisted, without being actually bound, by a committee. The Minister of Education has a very wide discretion to alter or adapt deeds of *charitable educational trusts* [1]; and he is the sole and final authority to decide " any question which may arise " with regard to the *superannuation, gratuity, balance of contributions, or average salary, of any teacher* to whom the relevant enactments (*i.e.*, the Teachers (Superannuation) Acts, 1918–1946) apply.[2] Under section 474 of the Merchant Shipping Act, 1894, the Ministry of Transport, as successor to the Board of Trade, has an almost unlimited discretion concerning the restoration of an *officer's certificate* of which he has been deprived by a court of inquiry. The same Act (ss. 169–181) confers on the Minister considerable judicial and discretionary functions concerning the disposal of the *property of deceased seamen* and claims thereon by creditors. By Regulations made under the National Health Service Act, 1946, governing the *superannuation of officers*, it is provided that " any question arising under these regulations as to the rights or liabilities of an officer . . . or of a person claiming to be treated as such . . . shall be determined by the Minister "; and, although the familiar formula that " the Minister's decision shall be final " is not used in this instance, it has been held that there is no appeal to the courts under this form of Regulation.[3] Even wider powers of decision are possessed by the Minister of National Insurance with regard to *contribution conditions, classes and qualifications of insured persons* and disputed death grants, and in these matters, which are conditions precedent to claims, the Minister may decide the question out of hand, dispensing with any formal hearing, or he may, at his option, appoint any person he chooses to conduct an inquiry and make a report. The Minister is not bound to disclose the report or the reasons for his eventual decision, though he may state a case for the High Court on a point of law, either on his own initiative or at the instance of the claimant. I respectfully agree with Messrs. Griffith and Street [4] that it is not easy to see why these questions, which may be highly controversial, of insurance and industrial injuries should be in the sole jurisdiction of the Minister—involving as they do mingled elements of fact and law—when so much else under these statutes is committed to the adjudication of the Commissioner and of tribunals.[5]

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[1] Chiefly by the Education (Miscellaneous Provisions) Act, 1948, and Orders in Council made thereunder (S.I. 1949, No. 1845 and 1950, No. 587). These Orders transfer to the Minister of Education extensive discretionary powers which were formerly vested in the Charity Commissioners.

[2] Teachers (Superannuation) Act, 1925, s. 16 and First Sched.

[3] *Healey* v. *Minister of Health* [1955] 1 Q.B. 221, whereon see S. A. de Smith, *Modern Law Review*, March, 1955, p. 163. Contrast appeal by case stated in the superannuation of local government officers, *post*, p. 99.

[4] *Principles of Administrative Law*, 158 *et seq.*

[5] In *Healey* v. *Minister of Health*, Cassels J., at first instance ([1954] 2 Q.B. at p. 242), observed: " I cannot help feeling that it is a matter of some concern that

It is unusual, and on general principles it is to be deprecated, that Ministers should have in their own hands power to determine questions of *compensation*; but there are some examples of this form of administrative adjudication. Thus under section 116 and the Fourth Schedule of the Road Traffic Act, 1930, the Minister of Transport was given the responsibility of determining compensation due to local government employees who had suffered loss of office as a result of rearrangements made by the Act; and in this instance an appeal was given to the Treasury—a curious and rare example of an appeal from Caesar unto Caesar. Similarly, under section 567 of the Merchant Shipping Act, 1894, the Minister of Transport has the final decision of expenses or fees due to wreck receivers.

There is at least one conspicuous instance of a Ministry having assumed a jurisdiction of compensation which it never rightfully possessed. Under the Electricity Supply Act, 1919, s. 22, joint electricity authorities, or other "authorised undertakers," were given power to take electric lines across private lands, subject to the consent of the Board of Trade (later the Minister of Transport and Civil Aviation). The Minister might, "if after giving all the parties concerned the opportunity of being heard he thinks it just" (it will be observed that the power was thus entirely discretionary) "give his consent either unconditionally or subject to such terms, conditions and stipulations as he thinks just; and in deciding whether to give or withhold his consent, or to impose any terms, conditions or stipulations, . . . the Minister shall among other considerations have regard to the effect if any on the amenities and value of the land." This was interpreted to mean, in practice, that the Minister had uncontrolled power to fix compensation for wayleaves. The Minister's decision was guided (if he so wished and "thought it just") by an inspector's report, which, however, the property-owner was not permitted to see. With regard to the actual assessment of compensation, in cases of doubt the practice appears to have been that the Ministry consulted the Valuation Department of the Inland Revenue; but there is no clear evidence that the property-owner ever had any means of making representations to that department. This departmental practice continued for many years, in spite

the question whether the plaintiff (and it may be a large number of similarly situated employees) is within or without the superannuation scheme . . . should not be decided by a court of law instead of, under the Act and regulations, by a Minister acting, doubtless, through one of his departments. Nobody knows what submissions, if any, were made. Nobody knows how, if at all, the case for or against the plaintiff was put. Something was decided against the plaintiff behind closed doors. It may be that it was a correct decision. It may be that it was a wrong decision. If it were possible to allow the plaintiff to proceed with his case, it would be argued in open court and, even if he failed, at least he would be able to say that he had had a hearing in public. I hope that he derives adequate satisfaction from the knowledge that for that departmental decision against him the Minister is answerable to Parliament."

of protests, until it was held to be *ultra vires* in *West Midlands Joint Electricity Authority* v. *Pitt* [1932] 2 K.B. 1. Under that decision the property-owner obtained the right to arbitration within the terms of the Electric Lighting Act, 1882, and the Acquisition of Land (Assessment of Compensation) Act, 1919. It is needless to say that different considerations apply since the nationalisation of electrical supply.

## *Arbitral Jurisdiction*

In many circumstances a Minister is called upon to settle a dispute which has arisen between two or more public authorities, and he is then really in the position of an arbitrator. This kind of ministerial function is of long standing. Thus, as long ago as 1851, by the Poor Law Amendment Act, s. 12, the (now defunct) Local Government Board was authorised to decide any disputed question—and disputes were frequent under the old Poor Law—about the settlement, removal or chargeability of any pauper. The Act (which was repealed by the Poor Law Act, 1927) made the Minister's order, being under seal, final and conclusive in all courts.

To take a few examples at the present time: Under the National Health Service Act, 1946, s. 47, the Minister is empowered to decide any dispute arising between an Executive Council and a person receiving, or claiming to receive, services under Part IV of the Act, or between an Executive Council and a local authority with regard to the conduct of a health centre. (When, if ever, health centres are established on the scale contemplated by the Health Service scheme, this latter responsibility may become very important and possibly arduous.) Under section 67 of the Education Act, 1944, the Minister may, on reference to him by the parties, decide any dispute between a local education authority and the manager or governors of a school concerning the proper discharge of their duties. (This is an old power, formerly exercised by the Board of Education, under the Acts of 1902 and 1921, and, *mutatis mutandis*, it was under review in the famous case of *Board of Education* v. *Rice* [1911] A.C. 179. That case, and others in which different remedies were obtained,[6] made it clear that when a point of law was in issue the Ministerial decision was subject to review by the High Court; and this principle does not seem to have been altered by the Act of 1944, though under that statute the administrative jurisdiction is in some respects wider than under the earlier enactments.)[7] By the same section the Minister determines any dispute between two local authorities with regard to the responsibility for the education of a child, and in this event the disputants are bound to refer the question to him.

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[6] *Gillow* v. *Durham C.C.* [1913] A.C. 54 (declaration); *Martin* v. *Eccles Corporation* [1919] 1 Ch. 387 (injunction).

[7] The earlier cases were chiefly concerned with disputes about "non-provided" schools—a classification which has now disappeared.

This kind of mediation between authorities which contest responsibilities (and of course costs) of certain public services is a common departmental duty. Thus, under the Local Government Act, 1929, the Minister of Transport and Civil Aviation is made the arbiter in many different kinds of contentions between county councils and urban district councils about the maintenance, cost, classification and transfer of highways. Similarly [8] he may mediate between two local authorities who jointly work a ferry and who are at issue about their shares of costs. An officer of the Ministry (a Marine Superintendent) is the final judge in a dispute between a master or owner and a seaman about wages, if the parties agree to submit the matter to him; if the amount concerned is less than £5, the Superintendent may adjudicate finally at the request of either party, though he may refuse if he considers that the issue ought to be decided by a court of law (Merchant Shipping Act, 1894, s. 137). Again, there is sometimes a controversy about the responsibility for removing a wreck in tidal waters. Ordinarily this is the duty of the harbour or conservancy authority, but in some circumstances it may fall upon the general lighthouse authority. The Minister of Transport is the sole and final arbiter of their respective liabilities (Merchant Shipping Act, 1894, s. 533).

These and many other arbitral functions in shipping matters formerly fell to the Board of Trade, which, though its control of shipping has passed to the Ministry of Transport and Civil Aviation, retains similar powers in various commercial matters. Thus, by section 7 of the Weights and Measures Act, 1904, a curious privilege is given to the Ministry of interpreting its own regulations. If these, or any method of testing weights and measures, are in dispute between an inspector and any other person, then, at the request of either party, the Board is the final interpreter. Since at least one of the parties—the inspector—is likely to appeal to his own department in self-vindication, it seems odd that the Board should possess this conclusive right to determine " the meaning or construction " of its own regulations. There may be analogies elsewhere to this power, but they are unknown to the present writer. There appears to be little case-law on the point, doubtless because under this provision such disputes are unlikely to reach the courts.

As final examples of Ministerial arbitration, we may mention the power of the Home Secretary, under Part IV of the Justices of the Peace Act, 1949, to decide financial questions in dispute between a local authority and a Magistrates' Courts Committee; and a similar power in the Home Secretary, by the Coroners (Amendment) Act,

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[8] By the Ferries (Acquisition by Local Authorities) Act, 1919, s. 1 (3).

1926, s. 7, to mediate between a local authority and a coroner with regard to a change in his emoluments, which are paid by the local authority.

### *Licensing Jurisdiction*

The granting of licences involves both administrative and judicial elements, being—if we may put the matter compendiously—judicial in process and administrative in effect. Certain " first instance " licensing powers of departments are therefore mentioned here; and they are distinct for present purposes from the *appellate* jurisdiction of departments, and especially of the Ministry of Transport and Civil Aviation, in licensing matters. These latter we shall have occasion to mention presently.

Direct powers of licensing by departments are not very common, but are by no means inconsiderable. For example, the Prevention of Fraud (Investments) Act, 1939, was aimed at " outside brokers " whose dealings were frequently of a purely gambling nature; and under this statute all *investment dealers,* except members of the Stock Exchange and similar recognised bodies, must be licensed by the Board of Trade, whether they be principals or agents.

The Home Secretary has a wide and final discretion in the grant of licences to establish new factories and magazines for the manufacture of *explosives,* though here he acts in conjunction with the local authority concerned, by an elaborate procedure laid down by the Explosives Act, 1875. By the Metropolitan Public Carriages Act, 1869, and various Orders made thereunder, the Metropolitan Police Commissioner is the delegate of the Secretary of State for the issue of *licences for hackney carriages in the metropolitan area.* Although he cannot refuse a licence to any person over the age of twenty-one except on certain specified grounds (chiefly criminal conviction), he appears to have an unlimited discretion in the revocation of cab licences. He need only be " satisfied, by reason of circumstances arising or coming to his knowledge," that the licence-holder is not a fit person to possess it.[9]

### *Managerial Functions*

I venture to use a term which may seem contradictory (and does not pretend to be exact) under the heading of the " judicial "; but it may serve to indicate a number of situations in which the administrator, though in certain aspects of his functions he acts as an arbiter, holds in reserve such powers that he may, in the last resort, become not only the strategist but the actual tactician of policy.

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[9] London Cab Order, 1934: see *R* v. *Metropolitan Police Commissioner, ex p. Parker* [1953] 1 W.L.R. 1150.

The most conspicuous example of a whole congeries of powers of this kind is to be found in agriculture. These centralised functions are nearly all of recent growth and are the offspring of national exigency which was too tardily recognised. Between the two world wars agriculture, in a country which notoriously could not feed itself, fell into grievous neglect and a constructive, comprehensive policy did not appeal to any party in power as an attractive political programme. When the 1939 war broke out and the country was faced with the possibility of submarine blockade and consequent starvation—which, indeed, had come within an ace of defeating it in the earlier war—an enormous leeway had to be made up. The most energetic emergency measures were necessary to restore even a moderate degree of efficient cultivation and production. The peril did not disappear in the world economic confusion which inevitably followed the end of hostilities. A number of Acts were passed to regulate different departments of agriculture, both its production and its economics, and the most comprehensive were the Agriculture Act, 1947 and the Agricultural Holdings Act, 1948, with the innumerable statutory instruments which have been made under them. These embodied, developed and amended a large number of the controls which had grown up during the war. A very elaborate system of supervision, involving many different judicial and executive authorities has been established; reference has already been made to some of the tribunals which operate under it, but a detailed description of it would be far beyond the scope of this book or the competence of its author.[10] In general, however, it may be said that there is an intricate interlocking of judicial and administrative functions between a number of authorities, the chief of which are the Ministry, the Agricultural Land Commission, the Agricultural Land Tribunals and the County Agricultural Executive Committees. All these have a variety of duties, and one interesting feature of them is that these functions interact; many disputed questions are referable to the Minister, but sometimes on a reference by the Minister he is bound by the decision of a Land Tribunal. In the main, however, and subject to numerous safeguards and procedures, there remains in the Ministry of Agriculture a residue of powers over such important matters as types of production, improvements, equipment, supervision, dispossession and husbandry in general, which may be described, without any stretch of language or imagination, as managerial in their total effect. It is to be doubted whether any other Ministry possesses, or ever has possessed, such stringent and extensive control at the centre. That a national policy is necessary and overdue in a land-hungry, overpopulated country, which is a highly vulnerable target in atomic warfare, no reasonable person can doubt—or, if there is any doubt, it is for economists and politicians to resolve; but for the lawyer it is a question whether the modern controls, in both their design and their operation, may not have swung too far in the opposite direction from the inertia which, within recent memory, reduced agriculture to such sorry case.

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[10] A clear short account is given in Robson, *op. cit.*, 281 *et seq.* It is needless to say that a mass of case-law already surrounds the subject.

What has been said of the Minister of Agriculture applies in no less degree to the Minister of Housing and Local Government. He is a very active, and for the most part final, appellate authority with regard to the grant or refusal by local authorities of permission to develop, but the ultimate pattern of planning, after all local authorities have excogitated their schemes, is in his hands. He is the Managing Director.

Much the same may be said of the Ministry of Education. As an example of its general " managerial " powers, consider section 68 of the Education Act, 1944, which reads as follows (the italics, of course, are mine):

> " If the Minister is *satisfied, either on complaint by any person or otherwise* that any local education authority or the managers or governors of any county or voluntary school[11] have acted *or are proposing to act unreasonably* with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may, *notwithstanding any enactment rendering the exercise of the power or the performance of the duty contingent upon the opinion of the authority or of the managers or governors*, give such directions as to the exercise of the power or the performance of the duty *as appear to him to be expedient*."

With this provision must also be read section 99 of the Act, which refers not to " unreasonable " conduct on the part of education authorities, but to their actual default in the execution of their statutory duties. Here again the Minister has only to be " satisfied, either upon complaint by any person interested [12] or otherwise " that the authority has failed in its duties. He is then empowered to make an order declaring the authority in default, and his order is enforceable by mandamus.[13] He may then give such directions as he considers expedient for restoring efficiency, and by the same section he may if necessary appoint his own managers or governors of a county or voluntary school.

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[11] By the Second Schedule of the Education Act, 1946, these terms are extended to include certain delegates of the educational authority—*e.g.*, divisional executives or any committees or sub-committees thereof.

[12] There appears to be a subtle difference here from s. 68, where the complaint may be made by " any person."

[13] There does not seem to be any reported example of such proceedings under the Act of 1944, and indeed they would seem to be futile, since the Minister's order is irresistible, except possibly for defect of form. Under the Act of 1902 a mandamus arising in connection with religious instruction in a non-provided school was unsuccessfully contested as far as the House of Lords: *Att.-Gen.* v. *West Riding of Yorkshire C.C.* [1907] A.C. 29.

It is difficult to imagine a more absolute charter than this. The Board of Education already had extensive default powers under the Education Act, 1921, but that statute provided for a public inquiry before the Board's order was made. The provisions of the Acts of 1944 and 1946 are one among many examples of the increasing tendency to place complete discretion in the hands of the executive. The employment of the magic word " satisfied," with nothing more, makes them for all practical purposes " judge-proof." It may be safely assumed that the Minister of Education does not supersede a local authority save after the most grave consideration nor, doubtless, without much correspondence, admonition and consultation with the defaulter. A step so serious is not likely to be, under any rational administration, a mere *brutum fulmen.* Yet there is nothing in the Act which compels the Minister to disclose the source of his information or the nature of the complaint or to announce publicly the reasons for his decision. Again, what is " unreasonable " not only in accomplished fact but even in *contemplated* action seems, under section 68, to be entirely at the interpretation of the Minister, and surely there is nothing in fact or in law which is capable of more variable constructions.

This example may also serve to illustrate a common case of " managerial " functions—*i.e.*, the " default " powers of a Ministry to carry out duties which a local or some other public authority has failed to perform. These, once put into effect, are of course purely executive, but are not resorted to until the central authority, by a process which may fairly be called judicial, has determined their necessity. Such powers are common in different branches of local government and are one of the grounds on which a considerable school of thought holds, rightly or wrongly, that decentralisation through local government is increasingly weakened by the overriding powers of Whitehall.

## APPELLATE JURISDICTION

Ministries are frequently courts of appeal, either finally or with further resort to the High Court, from the determinations of subordinate authorities. Their functions in this respect are essentially judicial. Again selecting only a few typical examples, we may say that these processes are roughly of the following kinds:

### *Appeals from Local Authorities*

The most frequent instance of this kind occurs when there is a conflict between the public works and projects of local government and the claims of private property; and naturally the larger part of these processes fall to the Minister of Housing and Local Government. Thus under the Housing Acts, a property-owner who objects to a local authority's slum clearance order may appeal to the Minister who, after holding a public local inquiry, decides whether or not to confirm the order; and in this case, if the decision is adverse to the objector, there is a further appeal, within six weeks, to the High Court, though only on certain specified and limited grounds.[14] Very wide appellate powers of appeal from local planning authorities with regard to permission to develop land are confided to the Minister of Housing and Local Government; and they are more than judicial powers, for the Minister may, in effect, supersede the local authority altogether, making his own modifications in pursuance of a general planning policy and thus assuming what we have called " managerial " functions. Indeed, the Act of 1947 specifically provides that in these appeals the Minister may " deal with the application as if it had been made to him in the first instance " (s. 16 (2) ); and he has power to direct any or all local authorities that any or certain kinds of development applications shall be referred directly to him in the first instance (s. 15). The parties in dispute are to be given an opportunity of stating their cases, but if the Minister is of opinion that the permission should or could not have been granted in any event, he need not entertain an appeal at all (s. 16 (1) ). This seems to be a curious and questionable power of prejudging an issue and short-circuiting appeal; but it is arguable that it is no more unusual than the " leave to appeal " which is common enough in the courts both in civil and in criminal law. It is, at all events, a clear example of the notably judicial character of ministerial functions in determining whether or not an issue is " justiciable." [15]

The Minister of Health formerly exercised an extensive appellate jurisdiction, derived chiefly from the Public Health Act, 1875, from decisions and orders of local authorities in housing matters. These have all been transferred from him to courts of quarter and petty sessions by the consolidating Public Health Act, 1936 [16] and later enactments. The Minister of Housing and Local Government has large appellate powers with regard to the superannuation entitlements and benefits of local government officers, and his decision is final; but as these appeals frequently involve delicate questions of law, the Minister may, or if required by the court must, state a case for the High Court on a point of law.[17] There is no review of his findings of fact. Equally important, and even more complex, are the appellate powers of the Minister of Housing and Local Government from District Auditors. Here there are really three methods of appeal, as has been explained previously (*ante*, p. 51).

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[14] The order may be either for demolition or for compulsory purchase ; but if, within twelve months from the making of a demolition order, the local authority is satisfied that repairs have been carried out sufficiently to make the house fit for human habitation, the local authority may apply to a county court to quash the demolition order (Housing Act, 1949, s. 2).

[15] On the whole procedure see S. A. de Smith in *Administrative Tribunals at Work* (ed. Pollard), 102 *et seq.* Mr. de Smith, though generally in favour of independent tribunals rather than departmental appellate powers, is of opinion that these appeals are best handled by the Ministry, on grounds of consistency of national policy : and he produces figures to show that appeals are not by any means decided with any bias towards local authorities. Mr. de Smith's experience in this matter is greater than mine, and I would not dispute that, for reasons which have been mentioned, the control of land in the peculiar conditions of this country presents special problems ; but I remain in doubt whether an independent tribunal could not evolve and maintain consistent principles as effectively as the Ministry, with a greater appearance of impartiality and with, as a consequence, greater confidence on the part of the public.

Among the various appellate powers exercised by the Minister of Education perhaps the best known, because it affects many parents, is his discretion with regard to school attendance. Everybody is aware that a local authority, if of opinion that the education of a child of compulsory school age is being neglected, may issue an attendance order requiring the child to become a registered pupil, and that failure to observe the order involves criminal penalties. The parent has a choice of school, but if the local authority considers it unsuitable, it may appeal to the Minister. If the parent desires a change of school, the local authority must comply unless it considers that the change is " unreasonable or inexpedient in the interest of the child," or that satisfactory arrangements cannot be made for it; and if the parent is aggrieved by a refusal to sanction the change, he may appeal to the Minister, " who shall give such direction thereon as he thinks fit." There is a similar provision concerning withdrawal, on the parent's application, of a pupil from one of the " special schools " which are established for backward children.[18]

### *Appeals from other Authorities and Tribunals*

The position here is much the same as under the last heading, except that the " agencies " concerned are not the " authorities " of local government in the ordinary acceptation. A prominent example is the appellate jurisdiction of the Minister of Health from various judicial bodies under the National Health Service; these we have already discussed.

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[16] For the history of the matter, and some criticisms upon it, see Robson, *op. cit.*, 116 *et seq.* In the last edition of his book, published in 1951, Professor Robson states that the sole appellate power in this connection which remains with the Minister is that given by s. 138 of the Act of 1936, whereby an occupier of a house who is required by a local authority to provide a supply of wholesome water for domestic purposes can appeal to the Minister on certain specified grounds. This section was, however, repealed and replaced by s. 30 of the Water Act, 1945; under which the appeal lies, within 28 days, to a court of summary jurisdiction, which may (apparently on any grounds at its discretion) disallow the order, or allow it with or without modifications.

[17] Local Government Superannuation Act, 1953, s. 21, re-enacting, with some extensions, the Local Government Superannuation Act, 1937, s. 35.

[18] Education Act, 1944, ss. 37 and 38.

By the Registration of Business Names Act, 1916 (s. 14), the registrar may reject a proposed business name, or remove it if already registered, if in his opinion it conveys a false impression that the business is under British ownership or control; and from the registrar's decision a conclusive jurisdiction of appeal lies to the Board of Trade.

Most important, perhaps, of the Board of Trade's powers are those which it exercises, under the Trade Marks Act, 1938. In few branches of the law are there more " borderline " questions of law, fact and discretion than in trade marks and designs. In this sphere the Board of Trade has both appellate and administrative functions, regulated by a series of enactments culminating in the Trade Marks Act, 1938. The Registrar for this purpose is the Comptroller-General of Patents, Designs and Trade Marks. There are a number of matters under the Act in which his decision is final; others in which there is an appeal from him to the court; others again in which the complainant has an option between appeal to the Board (whose decision is then final, except that the Board itself may refer the matter to the court) or to the court (Chancery Division), in which event there may be further recourse to the Court of Appeal. The various categories and circumstances in which these different procedures are available are more technical and detailed than need be described here. This is a matter on which anybody but an expert should hesitate to express an opinion, but to ordinary understanding this overlapping of jurisdictions seems unnecessarily complicated.

By the Pilotage Act, 1913 (s. 27) the Minister of Transport and Civil Aviation, as successor to the Board of Trade, is the authority for appeals by a candidate against irregularities of a pilotage authority in conducting an examination or imposing unreasonable conditions in granting it. If a certificate is unreasonably refused, or not renewed, or improperly detained, the pilot has a double recourse. He can appeal either to the Ministry or (under section 28) to a county court judge, or to a metropolitan or stipendiary magistrate having jurisdiction in the port and sitting with a nautical assessor. From this jurisdiction appeal lies, but by special leave only, to the High Court (in Admiralty). The procedure is elaborately governed by County Court Rules and Rules of the Supreme Court, but it seems to be resorted to infrequently—or, at all events, there are few reported decisions upon it. The reason for the concurrent forms of appeal is not obvious.

### *Licensing appeals*

It is not very common for a department to exercise an appellate jurisdiction with regard to licences, but in the field of road traffic we find a curious mixture of procedures. The Road Traffic Act, 1930 (s. 81) confers this judicial function on the Minister of Transport and Civil Aviation in respect of public service vehicles, road service licences and certificates of fitness. The section specifies five different grounds of appeal either by persons who have been refused a licence or certificate, or whose licences have been suspended or revoked, or, on the other hand, by local authorities or other undertakers of transport facilities who oppose the grant of a licence. The next section of the same Act, however, which refers to drivers and conductors of public service vehicles, adopts a quite different procedure. The driver or conductor who is aggrieved by refusal, suspension or revocation of a licence, must first state a case to the licensing authority for reconsideration, and then, if the decision is still adverse, he can appeal to a court of summary jurisdiction, whose order is binding on the licensing authority. Finally, there is a different method for goods vehicles licences. Appeal in this instance was given to a special tribunal by the Road Traffic Act, 1933; by the Transport Act, 1947 (s. 73), the jurisdiction was transferred to the Transport Tribunal, though the change did not actually come into effect until 1951.[19] I respectfully agree with Professor Robson [20] that it is difficult to see any reason for this variety of procedure. One would have supposed that all these types of licences were very proper for the appellate jurisdiction of the new Transport Tribunal. A consolidation and revision of the whole law of road traffic and its innumerable subsidiaries, and especially the complicated provisions governing goods vehicles (which have given the courts much trouble) is overdue.[1]

We have mentioned the licensing powers of the Home Secretary under the Explosives Act, 1875, and need only add that if a local authority dissents from the grant or conditions of a draft licence for manufacturing explosives, appeal lies to the Home Office. The same applies to licences for storage of petrol.[2] In this case the local

[19] The " appointed day " being August 15, 1951, by S.I. 1951, No. 1467.

[20] *Op. cit.*, 113.

[1] On one aspect of the matter, much information is to be derived from the Report of the Committee on the Licensing of Road Passenger Services (H.M.S.O., 1953), which we may call the Thesiger Report, after its chairman, Mr. Gerald Thesiger, Q.C. Before that Committee the overwhelming bulk of evidence was in favour of appeal to a separate tribunal rather than to the Minister, but the majority of the Committee was satisfied with the present system. One member, Mr. R. F. Lyne, dissented, and the present writer finds his arguments in favour of a tribunal incomparably more convincing than the views of the majority. So far as the question came within its terms of reference, the Committee (*Report*, para. 199) was content with different methods of licensing for road passenger services and for goods vehicles. It recommended very few changes in the whole present system.

[2] Petroleum (Consolidation) Act, 1928, ss. 1–3.

authority may be called upon to state the reasons for its refusal, and the Secretary of State may order an inquiry and report " if he thinks it necessary or desirable."

The Minister of Education has appellate jurisdiction in case of refusal by a local education authority to issue a licence for a child to take part in an entertainment for which a charge is made to the public—usually a theatrical performance (Children and Young Persons Act, 1933, s. 22). So far as I can discover, this recourse has been rarely invoked.

In liquor licensing there is no general appeal to the Minister of Housing and Local Government, though he has many powers of making administrative regulations under different parts of the Licensing Act, 1953: and under section 70 of that Act he may hear objections to licensing plans in New Towns and may, if he deems it necessary, order a public local inquiry.

### *Disciplinary Jurisdiction*

These powers are vested, so far as is known, only in the Home Secretary and relate to the organisation of the police and the fire services. By the combined effect of the Police (Appeals) Acts of 1927 and 1943, a police officer who is dismissed, required to resign, or reduced in rank or pay by the disciplinary authority (the Joint Standing Committee in a county or the Watch Committee in a borough) may appeal to the Home Secretary. The latter may (but I believe rarely does) consider that the issue may be decided solely on the documentary evidence before him; but the usual procedure is to refer the question to delegates, at least one of whom must be experienced in police administration, for inquiry and report, and the appellant is entitled to a copy of the report and of the departmental order. The Home Secretary may dismiss, allow or vary the decision of the disciplinary authority, or send it back for further consideration. His order is expressed to be " final and binding on all parties," but it was held in *Cooper* v. *Wilson* [1937] 2 K.B. 309, by the Court of Appeal, that this statutory provision does not, in appropriate circumstances, debar the aggrieved officer from recourse to the High Court for a declaratory judgment. Although we are not now concerned with the initial proceedings preliminary to the punishment of a police constable, it is perhaps worthy of note in passing that by the same decision those proceedings appear to be subject to the rules of natural justice. The procedure on appeal to the Home Secretary is governed by Statutory Instruments.

Similar appellate powers are vested in the Secretary of State by the

Fire Services (Discipline) Regulations, 1948 and 1949,[3] made under the Fire Services Act, 1947.

## GENERAL OBSERVATIONS

FROM the foregoing survey, necessarily incomplete though it is, it is hoped that the reader will have gained some general impression of the types and characteristics of the many judicial agencies which are now such a remarkable feature of our social system. It remains to discuss certain general considerations which they seem to suggest.

### NUMBER AND COMPLEXITY

I find without surprise that in the course of this survey I have mentioned over a hundred *types* of adjudicating authorities (excluding committees, etc., of inquiry, which cannot properly be regarded as judicial); but this, of course, does not represent their total number, which would have to include all local offshoots (such as National Insurance panels), and this could not be calculated without disproportionate labour. For the same reason I do not attempt even to guess at the total number of citizens engaged wholly or partly in tribunal duties. One cannot be more exact than to say that they must certainly be reckoned in thousands.

Leaving spontaneous " domestic " tribunals out of account, the vast majority are created by statute. This means, in theory, that they are begotten of Parliament, but it is rarely that they give rise to serious discussion in parliamentary debate, especially if a complicated and lengthy measure is, as so often happens nowadays, under a " guillotine " time-table. Thus it is very easy for new tribunals and similar agencies to come into existence. Sometimes, indeed, the parliamentary authority for them is only indirect; they may be created by Statutory Instrument under general Ministerial powers. A conspicuous example is the Industrial Disputes Tribunal.

It has not been argued here that any of the tribunals which have been mentioned is without some usefulness; on the contrary, many are discharging valuable functions which, in our present social order, could not well be performed by any other method of adjudication. I have suggested, however, and I would emphasise, that there is a somewhat light-hearted readiness to add to the number in new legislation, and this frame of mind may threaten several dangers in the future unless more restraint is shown.

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[3] S.I. 1948 No. 545, 1949 No. 2161. The disciplinary jurisdiction in the first instance is in the Chief Officer, with appeal to the fire authority in some circumstances and to the Home Secretary for dismissal or the more serious penalties; but there is no appeal from a mere caution by the Chief Officer; and in *Re Fry* [1954] 1 W.L.R. 730 it was held that certiorari will not issue to him in that event.

First, there is the problem of manning all these bodies with properly qualified persons. I will refer presently to this question. Secondly, with the increase of numbers there is a danger of over-elaboration—always a besetting sin of those who are preoccupied with the blue-print rather than the actual operation of the machine. We have seen examples of this excessive complication in the National Health Service and the various agricultural authorities. Thirdly, the piecemeal multiplication of tribunals of so many different types, with no consistent pattern, greatly complicates our administrative law and renders more and more difficult the task of reducing it to any kind of systematic understanding or application. And lastly, the existence of a large number of parallel bodies judging the same kinds of causes leads to inevitable disparities of decisions. This is a defect which is by no means peculiar to tribunals; it runs throughout the whole of our criminal law, where, amid the very large number of courts operating, the inequalities of conviction and penalties are a frequent subject of criticism Such comments may or may not be justified—they are often based on an imperfect knowledge of the facts—but it is obvious that the more courts there are in the same sphere, the greater the variations are likely to be. For example, there appears to be the minimum of consistency in the decisions and the methods of calculation of the Furnished Rent Tribunals; and how widely the local Tribunals for Conscientious Objectors have differed is shown by the fact that a steady proportion of more than half their decisions have been varied on appeal.[1]

### Composition

Again and again there is evidence of care to ensure (in theory at least) the appointment of tribunal members who are most likely, from their experience, to understand the matters with which they will have to deal. Consider, for example, the composition of a War Pensions Tribunal (*ante*, p. 40), or of a tribunal for voluntary Children's Homes (*ante*, p. 25) and the numerous instances of balancing a tribunal with representatives of capital and labour.

The reader will also have observed how frequently the chairman of a tribunal is not a specialist but a lawyer of standing, usually appointed by the Lord Chancellor. This principle is now well established and seems to be applied with growing frequency. If it is sound, it appears to provide some answer to those who imagine that a lawyer's natural instinct is to " sabotage " administrative policy (not to mention social welfare). One who has himself been bred in the law is not an impartial witness in this matter, though he is not necessarily blind to the faults and foibles of his profession. But it is not mere bias which leads to the conviction that unless an experienced lawyer is incorrigibly foolish or perverse by temperament, his whole training instils into him an instinct and a technique of impartiality which add materially to the dignity of a tribunal and which are not easily acquired in the same measure by any other kind of experience. It is a matter on which it is impossible to generalise, for there may be regrettable exceptions—as, indeed, there are in the ordinary courts—but I would hazard a guess that the legal element, especially in the president's chair, has strengthened both the efficiency of tribunals and the confidence of the public. I am inclined to believe that, with a few exceptions, the executive itself welcomes this makeweight to what might otherwise be conflicting elements.

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[1] See *Administrative Tribunals at Work*, 10.

It will have been noticed that in not a few cases—*e.g.*, war pensions, demolition or compulsory purchase orders in housing, war damage, patents, a Court of Survey—the tribunal of appeal consists of a specially appointed High Court judge. This expedient has worked very well and, for myself, I should like to see it extended in appropriate circumstances, though I fear that that may be a vain wish, since our judges at present have a more than sufficient burden to bear. Here again there is no evidence that judges have proved reactionaries or obstructionists, and there is little substantiation of the frequent argument that judges are not qualified to appreciate purely technical concerns—for many of these subjects are highly technical and, as the merest glance at our law reports will show, judges are constantly dealing with abstruse technical matters as part of the day's work.

What is the average quality of the membership of tribunals? Nobody could answer that question without a vast amount of observation and research, and even then the opinion would be merely subjective. The same question might be asked of the justices of the peace, and it would be equally difficult to answer. The fitness of the magisterial bench is at least safeguarded by a double screening; justices must be recommended by Advisory Committees (which, on the whole, take their difficult work very seriously) and must then be approved by the Lord Chancellor, whose scrutiny, through his department of Commissions of the Peace, is by no means perfunctory. But how are the chairmen and members of tribunals chosen by the various Ministerial authorities? This question belongs to the impenetrable arcana—as, for that matter, does the whole responsibility for judicial appointments even at the highest levels; for nobody knows exactly how or by what method an individual is selected from the Bar for elevation to the Bench. Somewhere within the Department concerned there must be some vigilant officer, or some special branch, whose duty it is to find and to invite our hosts of judges in Israel. Sometimes, it would seem, organisations or local authorities are invited to submit names. Probably the methods employed vary considerably with different Ministries.[2] There is no reason to doubt that all practicable care is taken, but it is obvious that when so many individuals are concerned the choice cannot always be very exactly weighed—indeed, such little sidelights as one has had from time to time suggest that the selection is sometimes a bow at a venture, at the instance of a chance personal recommendation. Whether that be so or not, it is difficult to believe that every one of these appointments is preceded by a very full measure of inquiry, for on the face of it that would seem to be too much to expect of the routine of a busy Government Department. One hears and reads that there is sometimes difficulty in finding suitable persons, and there have been criticisms especially of the composition of Furnished Rent Tribunals, but I am not in a position to say whether these strictures are justified or not. I have already suggested, with regard to Agricultural Executive Committees, that there are grave objections to tribunals, exercising both judicial and inquisitorial powers, being composed of neighbours and possibly of competitors and rivals, when they are dealing with local interests which may involve personal conflict or prejudice.

It is sometimes suggested that remuneration for time and services is insufficient to attract suitable tribunal members, especially chairmen. On some tribunals service is voluntary, but the majority of members receive payment in some degree or other, usually fees per session, with travelling and subsistence allowances. Whole-time chairmen of the more important appellate tribunals in constant or frequent session are, of course, paid at higher rates, on about the same scale as county court judges or stipendiary magistrates; while chairmen of lesser tribunals, not in constant session, are paid higher fees than the other members, in proportion to their responsibilities. There are occasional hints that some assiduous citizens almost make a profession of sitting on tribunals and other bodies of an administrative, judicial or advisory kind; but if so, I do not think it can be a very rewarding occupation, though doubtless there are many, especially the retired, to whom the fees are a welcome supplement to pensions or savings. On the whole, however, I should conjecture that with most part-time tribunal members public spirit, with perhaps a little flattering but venial sense of importance, are more powerful motives than profit, especially when the profit has suffered income tax and has often been earned at considerable sacrifice of time and effort. The motives are probably mixed, but I venture to doubt whether, if the personnel of tribunals continues to grow at its present rate, the real problem will be financial inducement so much as personal qualification and willingness.

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[2] Dr. R. M. Jackson ("Tribunals and Inquiries," *Public Administration*, Summer, 1955, p. 117) makes the point that the selection of clerks to tribunals is also very important and might be the subject of inquiry.

However, the country does recognise some pecuniary obligation to the majority of those who perform judicial duties; and I cannot refrain from commenting on the paradox that the 17,000 justices of the peace, who on the whole devote far more time to their duties than most tribunal members, and who save the national budget immense sums in the administration of criminal justice, receive not a doit for their services. Evidently they are too venerable, too self-effacing or too unworldly to have caught up with the finance of the Welfare State. The present writer, for one, hopes that they will ever remain in this state of *sancta simplicitas*.

## PROCEDURE

There is a bewildering variety of procedure among all these different bodies and no attempt has yet been made, as in the United States, to establish any minimum standards of uniformity. We have seen repeatedly that the procedure for individual tribunals is laid down by Statutory Instrument, and nobody would dispute that rules of this kind are necessary for many details, such as the forms and time-limits of applications, appeals and all similar machinery. But the nature and scope of these regulations vary enormously. Sometimes a strict and formal code is prescribed, as in the case of the Transport Tribunal or the Agricultural Lands Tribunal, but in other cases a wide discretion is left to the tribunal to fix its own procedure, except with regard to the " machinery " requirements. There may even be a triple authority for procedure—the statute itself, a schedule prescribing a general framework of the tribunal, and further rules made, under the sanction of the schedule, by the tribunal itself, perhaps in conjunction with some other authority, such as the Lord Chancellor.[3] On the whole, the recent tendency seems to be to regulate procedure with considerable particularity. Anybody who had the curiosity to compare and collate all the relevant regulations could easily exhibit the most extraordinary divergences.

Most tribunals sit in public, and where there are exceptions, such as the Service Committees under the National Health Service, the Solicitors' Disciplinary Committee, and the Assistance Appeal Tribunals, there are plausible reasons, in the interest of the party most concerned, for hearing in camera. The necessity for privacy in the local insurance tribunals is not so obvious. Many tribunals have power to clear the court at their discretion; they rarely do so, but I have known this expedient to be used beneficially in a few cases of conscientious objectors who had intimate personal stories to tell. On the whole, the sacred principle of open and public justice is well preserved, though tribunals seldom offer that dramatic element which attracts so many " regulars " to the galleries of our courts.

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[3] See, *e.g.*, Wireless Telegraphy Act, 1949, s. 9, Second Sched.

Few tribunals are bound by the strict and technical rules of evidence and I am sure that this is, on the whole, an advantage, so long as we can rely on most chairmen, as at present I think we can, to keep testimony within the bounds of relevance and restraint. It would, for example, be utterly futile to be constantly checking inarticulate (or garrulous) persons with the curb of the hearsay rule. On the other hand, justice will not be done if a tribunal, either by its rules or its own sense of propriety and fairness, recognises no discipline over the admissibility of evidence. What constitutes " evidence " before a tribunal was exhaustively considered by Denning J. in *Starr* v. *Minister of Pensions* [1946] K.B. 345, and had previously been examined, also in relation to the Pensions Tribunal, by Tucker J. in *Moxon* v. *Minister of Pensions* [1945] K.B. 490. Apart from special considerations arising out of the provisions of a Royal Warrant, the main principles laid down by Denning J. were that " only that is evidence which is logically probative " and that the function of a tribunal is " not to supply evidence but to adjudicate on the evidence." Tucker J. said (at p. 501):

> " It is, I think, of the essence of ' evidence,' according to English ideas, when used with reference to judicial or quasi-judicial matters, that it should consist of oral statements or documents in writing which are made in the presence of or communicated to both parties before the tribunal reaches its decision. This is not in my view confined to judicial tribunals bound by legal rules of evidence, but is equally applicable to a quasi-judicial tribunal, such as a pensions appeal tribunal, which is expressly required to have regard to the onus of proof in its adjudications."

An express provision about onus of proof is rare, but whether it exists or not, the principles of the " logically probative " and of objective adjudication are fundamental, and in their absence questions of natural justice immediately arise. These elementary characteristics of " evidence " are not dependent on the highly technical and elaborate rules which apply to forensic procedures in most courts. They are, in essence, matters of common sense and common fairness.[4]

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[4] An interesting point of evidence, which probably concerns many tribunals, arose in *Stockbridge Mill Co., Ltd.* v. *Central Land Board* [1954] 1 W.L.R. 886. Are previous transactions, comparable to that which is before the tribunal, admissible in evidence? (In this case they were certain assessments of development value by the Central Land Board.) It was held that they were admissible, even though not recorded in any public document, but that they went only to weight—*i.e.*, it was open to the appellant to rebut them by showing that they were not truly analogous

Oral hearing is usual and quite essential. It would be disastrous if administrative causes were decided on documentary evidence alone, whether supplied by the applicant himself or from official sources. I speak only from limited experience of other tribunals, but I entirely confirm Mr. Pollard's unfavourable view [5] of the kind of " notes of evidence " which came from local tribunals to the Appellate Tribunal for Conscientious Objectors. Not only were they frequently inaccurate and misleading, but they were couched in such staccato telegraphese that often they would have been quite worthless without the *viva vox* to put breath into them. It is to be hoped (and supposed) that the reports of " hearing officers "—*e.g.*, under the National Health Service—are not quite so bloodless.

Many tribunals which we have mentioned have nearly all the powers of courts of record in enforcing attendance of witnesses and discovery of documents, but this of course is not a characteristic of the lesser satellites. They, however, often have power to take evidence on oath if they consider it desirable. This seldom happens, but I have known it to have a salutary effect on a shifty or contumacious tribunal witness.

Informality is generally desirable and is carefully cultivated. " Putting at ease " is a material assistance to justice and is not always easily achieved, whatever sympathetic efforts may be made, in the atmosphere of a court of law. A balance must be struck, however, between informality and dignity. An anonymous writer in the *British Journal of Administrative Law* for May, 1954, describes, with evident approval, a sitting of an Agricultural Land Tribunal in an hotel lounge. The fortunate spectator found himself " comfortably seated in an armchair " (which all too rarely happens to spectators, juries, witnesses, or counsel, in our more ascetic courts of law). " Cross-examination rapped keenly to and fro across a haze of cigarette smoke. Not only the onlookers and junior counsel but members of the Tribunal themselves were smoking. There was a general air of good humour: laughter was frequent and an occasional aside was not rebuked; several documents and plans were admitted which had not been submitted with the statements of case." Was it at some such jovial gathering as this that, in Mrs. Woollett's case, twenty-four appellants lost their little acres at a single session? At a neighbouring tribunal, by contrast, the spectator soon learns " to bow to the Chairman on entry and behave with the same circumspection as he

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to his own valuation. The principle has been applied in rating valuations (*Pointer* v. *Norwich Assessment Committee* [1922] 2 K.B. 471). Such previous determinations therefore partake of the nature of precedents, though clearly not " binding " ones. It is difficult to see how a tribunal could develop a consistent policy without having regard to its previous determinations *in pari materia*, and the " evidence " merely reminds it of what, strictly speaking, is within its own knowledge.

[5] *Administrative Tribunals at Work*, 8.

would observe in court. The surroundings are usually as impressive as the market town can provide, and the atmosphere is grave and formal." It may be only a matter of taste, or it may be a matter of the prestige of justice, but this writer for one greatly prefers the less *dégagé* procedure. Justice need not be in a stiff shirt, but also it need not be in shirt-sleeves.

The extreme example of lax and undefined procedure, especially in regard to evidence, is to be found in the Furnished Rent Tribunals. In the now notorious *Paddington Rent Tribunal Case* [1949] 1 K.B. 666, Lord Goddard C.J. described the proceedings as "truly remarkable."

> "The council called no evidence. They did not put forward a single argument. Their representative merely informed the tribunal that as there had been two previous references by tenants, the council (*i.e.*, the local authority) had commenced referring the remainder of the contracts of tenancy to the tribunal. When evidence was called by the landlords, not a single question in cross-examination was addressed to the witnesses. We have not been informed of any facts relating to the two previous cases in which reference was made [to the tribunal] or the grounds upon which the tribunal granted a reduction."

In *R.* v. *Brighton Rent Tribunal* [1950] 2 K.B. 410, the Divisional Court laid it down that the governing Acts (those of 1946 and 1949) were to be so interpreted that, so long as the prescribed formalities were observed, these tribunals might (as they sometimes do) act *without any evidence at all* except their own "knowledge"—which may mean simply their own prepossession; and, it must be added, without giving any reasons for their decision.

> "It is quite obvious that these tribunals can act without having any evidence before them at all: neither party need appear; neither party need file any statement in writing unless he likes; a tenant can merely ask the tribunal to fix a proper rent; if he does, the landlord can appear, stay away, submit any statement, or, of course, call any evidence he likes . . . These tribunals [can] act on their own knowledge and without any evidence."

To the best of my belief, there is no parallel to this kind of procedure in the whole of our law, and if Parliament really intended such a result [6] its enactments in this regard are a blot without peer on our

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[6] One may be permitted to doubt whether it ever did. The Act was based mainly on the Ridley Report, and the Opposition did not question the desirability of some control over furnished lettings; but the debate does not disclose that anybody on either side had fully realised the imperfections of the Act as framed, such as they appeared in subsequent litigation. In short, the real mischief was hasty and clumsy legislation. I venture to suggest, with the greatest respect, that in the *Brighton* case it would not have needed an excess of "judicial valour" to refuse to read into the Act such a brutal repudiation of elementary justice.

Statute-book. In one case, *R.* v. *Kingston-on-Hull Rent Tribunal* [1949] 1 All E.R. 260,[7] the tribunal appears to have acted without hearing any evidence at all from the landlord. How often this has happened no man knows. At the end of his judgment in the *Brighton* case, the Lord Chief Justice urged the desirability of an appellate tribunal in these cases.[8] Five years have passed without any notice being taken of this very pertinent suggestion.

It is not surprising that, with such a *carte blanche*, some of these tribunals have repeatedly appeared in a most unfavourable light before the High Court. There is, as has been mentioned, no statutory appeal from them, but fortunately the Queen's Bench, by means of the prerogative orders, has been able to maintain some of its traditional discipline over them—though, as the *Brighton* case shows, it is severely limited. The duty of the tribunals is merely to fix a " reasonable rent," and its method of assessment is entirely at discretion.[9] There is nothing to prevent a tribunal from fixing a rent (and this, on registration, attaches to the *premises*, not to the individual) which is demonstrably uneconomic, and this has often happened. It has even been attempted to reduce the figure below the standard rate under the Rent Restriction Acts.[10] Some tribunals have grossly, and, it would seem, deliberately, exceeded their powers: thus in *R.* v. *Hackney, etc., Furnished Rent Tribunal* [1950] 2 All E.R. 138 and [1951] 2 K.B. 15, the tribunal took upon itself to rectify, on vague oral evidence, a written agreement and to pronounce on its contractual validity. " A more dangerous usurpation of power by one of these tribunals," observed the Lord Chief Justice, " it is impossible to imagine." [11] Similarly it has been attempted to award damages for an alleged breach of covenant by the landlord,[12] to read, on unproved grounds, a collateral agreement into a tenancy,[13] to order a second reduction of rent when no change of circumstances has been proved,[14] and to extend the period of security of tenancy before any notice to quit has been served.[15] The attitude of some tribunals towards landlords is well illustrated by *R.* v. *Fulham Furnished Rent Tribunal* [1953] 2 Q.B. 147, in which a landlord applied for an augmentation of the registered rental on the ground of his increased outgoings. Not only was his application refused, but the tribunal assumed a power to reopen the whole matter, revise its previous decision, and make a *further reduction* of rent. The *Paddington* case, already mentioned, illustrates the mistaken enthusiasm which may be displayed by local authorities, who, under the Acts, have an equal right with the tenant to apply to the tribunal for rent reduction. In that case the property concerned was a block of over 500 flats, many of which were already rent-restricted. A variety of services and amenities were supplied by the landlords. Two tenants obtained reductions of rent from the tribunal. Although there had been no complaints by other tenants, the Borough Council decided to apply, *in a single reference,* for reduction of rental of 302 other flats. From this heroic gesture they were restrained by a cautious Town Clerk; they therefore submitted 302 separate references. The care which had been taken over individual cases is illustrated by the fact that in many instances the names of the lessees were wrongly given, former lessees and empty flats were cheerfully included, and many of the tenancies which were described as furnished were in fact unfurnished. The tribunal heard only eight of the applications and reduced the rents, stating that it disregarded the value of any services and amenities. One of its reasons was that it did not consider the height of the flats (eight feet) to be in accordance with the best modern building standards—a matter obviously outside its cognisance. Before the remaining 294 references came on, the campaign of class-warfare was arrested by High Court proceedings and by an order of certiorari. This case fortunately stands alone, but it illustrates how gravely some local authorities and some tribunals may misconceive their functions. Although there can be no real excuse for such reckless proceedings by any sensible body of persons, Parliament must take some of the blame for leaving important public duties so ill-defined.

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[7] Unfortunately, the case is reported only on a question of costs, but it appears that certiorari had been granted for this defect of natural justice—whether rightly or not, in view of the *Brighton* case decision, it is difficult to say.

[8] Hereon see (1950) 66 L.Q.R. p. 437. There seems to be no disposition to extend legal control. On December 20, 1954 (see H.C. Deb., Vol. 535, Written Answers, cols. 234–235), Mr. Derek Walker-Smith, Q.C. asked whether the Government would provide means for stating a case to the High Court on a point of law. The official answer was dusty, being to the effect that there was sufficient control in the High Court (evidently by certiorari) if a tribunal " exceeds its jurisdiction or misdirects itself in law." The briefest study of the relevant cases will show how inadequate this answer is.

[9] Contrast the elaborate provisions of the Landlord and Tenant Act, 1954, for assessment of a landlord's increases over standard (restricted) rent.

[10] *R.* v. *Paddington Furnished Rent Tribunal* [1948] 2 K.B. 413.

[11] The *ratio decidendi* was, however, modified and explained in *R.* v. *Fulham, etc., Rent Tribunal, ex p. Zerek* [1951] 2 K.B. 1.

[12] *R.* v. *Hampstead Furnished Rent Tribunal* [1947] K.B. 973.

[13] *R.* v. *Croydon Furnished Rent Tribunal* [1948] 1 K.B. 60.

[14] *R.* v. *Fulham Furnished Rent Tribunal* [1952] 1 K.B. 179.

I do not suggest that this kind of behaviour is characteristic of all or even many of these tribunals. If it were so, the Furnished Rent Tribunals would have developed into a national scandal which (let us hope) public opinion would not have tolerated. It would be unfair to imply that all or most tribunals are dominated by the principle, which undoubtedly prevails in some quarters, that "the landlord is always wrong." He seems, however, to have achieved a high degree of wrongness, for according to one writer,[16] up to the year 1948 at least 72 per cent. of applications for reduction of rent were successful. At a time of acute housing shortage, some economic control of accommodation is clearly necessary, and all such measures are likely to engage political prepossessions which are not our present concern. I would only say that while there are many unreasonable and rapacious landlords, there are also many unreasonable and selfish tenants; indeed, I do not know of any common financial relationship in which sweet reasonableness is so seldom to be found, and I think that Polonius might well have included among his worldly counsels to Laertes, " Neither a landlord nor a tenant be." No doubt many tribunals are well aware of all this and are honestly doing their best with an extremely difficult task. But however small the proportion of really bad cases may be—and it is impossible to say what it is, or how many which might go to the High Court are not pursued so far—it is enough to warn us against tribunals of this type, in which evidence (always, by the way, unsworn) counts for so little and the personal discretion or indiscretion or guesswork of the tribunal counts for so much. The Furnished Rent Tribunals are a thoroughly bad precedent not in the purpose which they contemplate but in the means of fulfilling that purpose. The principal Act which governs them is officially described as " temporary." It has been kept alive by Expiring Laws Continuance Acts. It is much to be hoped that the opportunity will be taken to revise the whole system in the light of the numerous decisions, and at least to adopt the Lord Chief Justice's suggestion of an appellate tribunal with far wider powers of revision than the High Court's prerogative jurisdiction can accomplish.

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[15] *R.* v. *Folkestone Furnished Rent Tribunal* [1952] 1 K.B. 54.

[16] In *Administrative Tribunals at Work,* 78.

## LEGAL REPRESENTATION

Professional assistance at tribunal hearings is subject to strangely various rules. Often there is no statutory provision and legal representation is then normally allowed. The *general* right of audience of counsel or solicitors before a " judicial " tribunal (whatever that may be) seems, apart from statute, to be at discretion [17]; but if a tribunal is made master of its own procedure, it would seem that it can allow or forbid legal representation. Any tribunal, however, which deprived a party of legal assistance, unless it was expressly forbidden by statute or statutory instrument, would certainly expose itself to justified criticism. There are other circumstances in which parties are allowed to be assisted by friends, relatives or trade union officials (which means, in practice, by almost anybody) but not by members of the legal profession—for example, in inquiries (it would seem) by the

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[17] See Hals., L. of E., 3rd ed., iii, para. 24.

Commissioners of Customs and Excise (though they have wide powers of summoning witnesses, administering oaths, and so forth),[18] or before the local Insurance Appeal Tribunals, except by leave,[19] or some of the Services Committees under the National Health Service and Medical Boards for industrial injuries. How haphazard the system is appears from the fact that while representation is allowed in appeals for family allowances (*ante*, p. 25), it is forbidden on Hardship Committees (though allowed before the Umpire), on committees and panels under the Disabled Persons (Employment) Act, 1944, and before the Assistance Appeal Tribunals.[20] The same prohibition applied during the war to the Price Regulation Committees under the Goods and Services (Price Control) Acts, 1939 and 1941.[1] I am informed on reliable authority that this worked so unjustly that some committees simply ignored it. Nobody protested and no official action was taken. Under the old Unemployment Insurance (Court of Referees) Regulations, 1936 (S.R. & O., 1936, No. 334, s. 7 (1) (*b*)) appellants to the Court of Referees were not allowed to be represented by counsel or solicitor, and the same embargo was placed by the Ministry of Labour on appeals to the Local Appeal Board under the Essential Work Order.

The professed object here is to save expense and to circumvent a possible advantage of the rich over the poor. One cannot resist the impression that there is also an element of suspicion of the devices and desires of lawyers. Again I am a biased witness, but experience has taught me that to deny persons who are unable to express themselves the services of a competent spokesman is a very mistaken kindness. All magistrates are aware of this and are constantly embarrassed by the defendant who is not mute of malice but hopelessly inarticulate by visitation of God. Vocabulary, a sense of relevance and a capacity for sustained reasoning cannot be expected to be common or natural gifts. One has known a sympathetic persistence to elicit from a dumb defendant, who has helplessly pleaded guilty, a defence which is a complete answer to the charge; on other occasions a postponement and a quiet talk with a Probation Officer will put a wholly new complexion on the case. Mr. Pollard, who has practised extensively before tribunals, tells[2] how, even in the confidential relationship of solicitor and client, there is sometimes the greatest difficulty in extracting from an inarticulate person facts and considerations of almost decisive relevance. A court or tribunal in such a situation is like a doctor who cannot induce a patient to describe his symptoms.

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[18] Customs and Excise Act, 1952, s. 6, replacing ss. 38 *et seq.* of the Customs Consolidation Act, 1876. The Commissioners have power to regulate their own procedure, and it is understood that they do not allow legal representation at these inquiries, which may be such "as they consider necessary or desirable for the purposes of any assigned matter"; but my information is indirect only and unverified. No Statutory Instruments seem to have been made concerning the procedure of these inquiries.

[19] S.I. 1948, No. 1299. How often leave is requested I am not informed.

[20] S.I. 1948, No. 1454.

[1] S.R. & O. 1940, No. 25, s. 13.

[2] *Op. cit.*, 6.

The cost of litigation is indeed a problem in our society and I do not underestimate it; and the new system of legal aid could not be applied to our multitudinous tribunals without prohibitive cost to the public. But where there is any substance at all in a claim it is a disservice to a person even of moderate means to prevent him from having his case stated to the best advantage; and in many instances a modest outlay in fees will prove a good investment in the end. At all events, the whole question needs reconsideration and a greater degree of uniformity in tribunal jurisdiction. The citizen's means of presenting his case often seems to be of subordinate importance in otherwise elaborate procedural regulations and frequently, as I have said, no provision is made for it at all. To take one example, section 68 of the Factories Act, 1937, is a long, detailed and stern procedural provision for investigations into accidents and diseases in factories. The investigating officer, who may be any " competent person," is given all the powers of a court—summons, discovery, oaths, costs (referable, if necessary, to no less a person than a Master of the Supreme Court). Indeed, he has in some respects greater powers than an ordinary court, for he can enter and inspect " *any* place or building entry or inspection whereof *appears to the court* requisite for the said purposes," and in addition to administering oaths he has a strange and very unusual power of requiring a witness to make and sign a " declaration of the truth " of his evidence.[3] Disobedience of a summons is a criminal offence and failure to make discovery of a requisitioned document or return is punishable at the rate of not more than £10 for every day of continued default. Now, in the report which the investigating officer makes to the Minister (with " any observations which the court thinks right to make ") it is obvious that individuals, both employers and employed, may be gravely implicated, with an overhanging possibility of civil or criminal proceedings. Yet in this elaborate section not a word is said about representation of interested parties, and I am informed, though I cannot vouch for it, that in practice representation is not allowed.[4] If that is so, it is another example of the necessity for overhauling a most capricious aspect of our administrative law and procedure.

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[3] The purpose of this is unknown to me and I believe it to be unique. Exactly what it adds to the deponent's liability for perjury on sworn oral evidence I cannot guess.

[4] This may be because it is felt that employers would have the financial advantage, and that is certainly a factor of importance; but, if the old law of Workmen's Compensation is any guide, in any serious case there is no lack of financial support from trade unions in litigation which affects their members.

### AUTHORITY

Let us remind ourselves of Lord Greene's dictum in the *Racecourse Betting Control Board* case (*ante*, p. 42) that the determinations of tribunals—or at all events of those which exist by statutory or sub-statutory provenance or regulation—are *decisions*, which (I have suggested) can only mean judicial decisions. They are part of the "administration of justice," whatever technical distinctions we may choose to draw between courts and tribunals.[5] They are therefore binding on those whom they affect, and indeed on all Her Majesty's subjects, though the means of enforcement may and do vary greatly in different cases. We have seen, too, that sometimes tribunal decisions are a "determination" not only of the instant issue but of executive action, and therefore possibly, though only indirectly, of future Ministerial policy. Thus the decisions of the Transport Tribunal concerning charges schemes are authoritative, and those of the Children's Home Tribunal, the Agricultural Land Tribunal, the War Works Commission, the Investment Dealers Tribunal and the Wireless Telegraphy Tribunal are binding on the Minister, while in rating the assessments of the Valuation Courts are binding on the Valuation Officer. This is an important and an increasingly frequent feature of recent tribunals; it sets a desirable period to dispute, it may provide a precedent for future executive action, but it is believed that it does not preclude a Minister from the ordinary means of appeal against any irregularities in the tribunal's procedure, such as excess or abuse of jurisdiction. The annual reports of some of these bodies, like the National Assistance Board and the Transport Tribunal, are also, like those of the public corporations, of administrative, economic and indeed political value and are closely studied by experts in different fields.

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[5] When the "tribunal" of appeal consists of a single High Court judge, does anybody draw a distinction in his mind between the judge in that capacity and "in court"? A distinction, however, on which I express no opinion, may exist with regard to powers of contempt of court, which of course are not possessed by tribunals. It may also arise under a written constitution which assigns certain powers to "courts": see *Labour Relations Board of Saskatchewan* v. *John East Iron Works, Ltd.* [1949] A.C. 134. In that case, however, the Judicial Committee declined to formulate any general distinction between a court and a tribunal. It is sometimes suggested (see, *e.g.*, Viscount Simon L.C. in *General Medical Council* v. *Spackman* [1943] A.C. at p. 634) that one distinguishing mark is that a tribunal may not be bound by the strict rules of evidence; but that seems hardly a sufficient ground for regarding its procedure as other than "judicial." On the nature of courts in general, see Halsbury, L. of E., 3rd ed., ix, paras. 809 *et seq.*; but no very clear distinction emerges between court and tribunal. The same must be said of *R.* v. *St. Mary Abbotts Assessment Committee* [1891] 1 Q.B. 378, often cited in this connection.

Some statutory bodies, like the Executive Agricultural Committees, combine judicial and supervisory functions. I have given reasons for believing this, on general principles, to be undesirable, and the official satisfaction of the National Union of Farmers with the system does not convince me to the contrary.

### REASONED JUDGMENTS: PRECEDENTS

The Committee on Ministers' Powers [6] urged that reasons should be given and recorded for tribunal decisions and nearly all writers on our administrative law, so far as I am acquainted with them, have supported that view. It has recently been emphasised, though unfortunately not always implemented, by the decision in the *Northumberland Compensation Appeal Tribunal* case (*ante*, p. 43), because a statement of reasons *may* give recourse to certiorari when no other means of appeal is available.

This important question is principally one of the *mos judiciorum*. It is rarely that a governing statute or statutory instrument explicitly directs a tribunal to formulate its reasons, though occasionally some, like the Industrial Injuries Tribunal,[7] are required so to do. But it has been noticed that some bodies of weighty jurisdiction, like the Lands Tribunal and the Insurance Commissioner, do in fact give reasoned decisions, and many of these are indistinguishable in form and substance from the judgments of ordinary courts. In other places, such as the Furnished Rent Tribunals, notwithstanding that facts and calculations may be acutely in issue, it would seem that reasons are seldom given and the parties and the public are left guessing.

The statement of reasons involves the further question of records. In this respect there is weakness and uncertainty throughout the whole of our law. While it is based on a strict doctrine of precedents, yet only a fraction of decided cases find their way (entirely at the discretion of editors) into the various series of law reports, and it frequently happens that a court has to take cognisance of an unreported case vouched for by counsel.[8] In tribunal " case-law " there is an even greater dearth. We have seen that some Ministries adopt the laudable practice of publishing periodical volumes of typical decisions. Trade journals (*e.g.*, the transport press) often publish decisions which are of interest and guidance to their readers. Otherwise there has been no documentary material available to the general public, but since 1954 the *British Journal of Administrative Law* has done notable service by publishing decisions of some of the leading tribunals. This is a work which should not fall entirely on private enterprise and it is much to be hoped that it will be developed on a larger scale. Considering that we have separate series of reports for commercial, tax, insurance, criminal, magisterial and other types of cases, it is surprising that there is no special repository of administrative decisions.

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[6] *Report*, p. 100.

[7] By Reg. 19 of the National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948, No. 1299), the local tribunal is required to state the grounds for its decision (with reasons for any dissenting opinion) and to supply a copy to the claimant, to the insurance officer, and (this is unusual) " to any other person who appears to the tribunal to be an interested person." If the decision is adverse, the claimant must also be supplied with information about means of appeal to the Commissioner. This is an excellent precedent which might be more widely followed.

[8] See the present writer's *Law in the Making*, 5th ed., 251.

It must be acknowledged, however, that the logical conclusion of our system of recorded precedents would create an awkward dilemma. If all judicial decisions were published, the bulk of reports would be quite unmanageable (this is already a serious problem in the United States); and if every tribunal decision found its way into print, the result would be something beyond the dreams of the most insatiable researcher. Vast numbers of determinations would be of no permanent interest or enlightenment. We have to be content with another British compromise in all branches of the law but it is one of the many symptoms of our reluctance to recognise the nature and importance of administrative law that so little enterprise has been shown in documenting it.

Even if records were more abundant, it is doubtful to what extent the doctrine of precedents would be operative in administrative jurisdiction. I do not know how far the various Ministries at present keep local tribunals informed of higher rulings, but I can confirm Mr. Pollard's observations [9] on the very imperfect methods which prevailed during the war among Conscientious Objectors' Tribunals. A few rulings of the Appellate Tribunal on cardinal points of principle—*e.g.*, whether certain kinds of objection fell within the governing Acts—were recorded and were supposed to be distributed; but it was found repeatedly that they were either not known or were ignored by local tribunals. What remedy exists if this happens? I am not aware of any rule of law which compels an inferior to obey a superior administrative tribunal, and disagreement or even defiance is not at all inconceivable. Justices of the peace are sometimes threatened with disciplinary measures if they flout rulings of the Queen's Bench which they dislike, and if an inferior tribunal were openly contemptuous of higher authority, no doubt it would be removed from office. However, I do not suppose the danger to be serious. Common sense comes to the rescue; but it is another argument in favour of legal chairmen that submission to " higher authority " is bred in the bone of English lawyers. When decisions are to be recorded, again the lawyer has, or should have, an advantage. To shape facts, law and reasons into clear and logical form is not every man's gift even in the simplest case, and the least talented of lawyers cannot fail, in his training, to learn something of a technique which, at its highest, is one of the most admired achievements of the judicial mind.

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[9] *Op. cit.*, 14.

Though reasonable consistency is highly desirable, I doubt whether anybody would wish to see among tribunals the English doctrine of precedent in its strictest form. It is well known that in this matter we diverge from Continental and American doctrine, which refuses to see in precedent a law of the Medes and Persians. We do in fact escape extreme rigidity by various judicial devices which cannot be discussed here; and I doubt whether the most conservative lawyer would object to tribunals having a certain reasonable latitude to correct or modify previous decisions, as circumstances may demand.

The question of reasoned and recorded decisions is not entirely free from difficulty. Professor Robson [10] puts it thus: " Administrative tribunals should in all cases be required to give reasoned grounds for their decisions, to enunciate as far as possible the principles which they are following, and to publish reports of their decisions." While I entirely applaud the general principle, I suggest that this is perhaps too wide a requirement. There are a great many simple and straightforward cases which hardly need this apparatus, and there is a problem, which on practical grounds cannot be ignored, of time. I very much doubt whether, say, local insurance or assistance tribunals would be able to get through their work if they had to follow Professor Robson's principle invariably. No doubt the strictly logical answer to that difficulty would be that there ought to be more tribunals with more time, but practical possibilities cannot be ignored, and we have seen that there are substantial objections to the indefinite expansion of a lay judiciary. We may here compare the work of justices of the peace. It is well known that they do not usually give reasons—or, at all events, only the briefest—for their decisions. In a great many trifling cases where the defendant pleads guilty, it is clearly unnecessary to do so; but in any but these routine summonses—say, for parking or speeding offences—there is much to be said for a statement of reasons. Take one of the commonest (disputed) offences with which magistrates have to deal—that of driving without due care and attention. There is nearly always a conflict of evidence, sometimes acute and complex, which, on any well-conducted bench, is discussed carefully, and sometimes at considerable length, when the magistrates retire. Any judge or recorder summing up such a case to a jury might well take half an hour or longer, and so would the chairman of a magistrates' court in giving a full and reasoned judgment. This is true of many other common offences, such as shoplifting and assaults

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[10] *Op. cit.*, 627.

(in which, as in the wars of nations, neither party is ever an aggressor): and as for long matrimonial cases, teeming with charges and counter-charges between spouses, a comprehensive summation, even if made with skill and economy, might take hours.[11] The plain facts are that most lay chairmen could not discharge the task satisfactorily and that magistrates could never get through their work on such a system. This is regrettable—no less regrettable than the fact that the wholesale dissolution of marriage in this country could not be accomplished if the average undefended petition took more than about three minutes of the time of the court; regrettable because, after all, an accused person is even more entitled to know why he has been convicted than a party before a tribunal. But counsels of perfection have to yield to exigencies of circumstance, and I doubt whether it would be practicable to ask local tribunals to state any but the most curt reasons in much of their work. Different considerations apply to appellate tribunals, though even here the matter is not quite straightforward. Mr. Pollard [12] complains, quite legitimately, that the Appellate Tribunal for Conscientious Objectors does not state reasons. It might well do so in some cases; but in many others—indeed, in most—its conclusions are necessarily based on such subjective impressions that its recorded judgment could not amount to much more than saying that it was not convinced of the appellant's sincerity. I doubt, however, whether any general inferences can be drawn from this peculiar jurisdiction of conscience, which in truth is not a thing satisfactorily " justiciable " by any means known to man—nor, according to ancient and famous authority, by any means known to the Devil himself.

These qualifications are not intended to cast the least doubt on the soundness of the general principle commended by the Committee on Ministers' Power, by Professor Robson, and by many others. They point rather to the practical difficulties which inevitably arise from a large and various extension of judicial functions among the community. Difficulties of another kind exist when the adjudicating authority is not a tribunal but a Minister. To what extent does precedent influence departmental decisions? That it plays a part need not be doubted, for no administrator could develop a policy without attempting to preserve some degree of consistency; and when, as has been noted, a Ministry publishes bulletins of selected decisions, it is possible for the public to understand the general considerations which have weighed with the Minister and in this way to form some notion of his dominant policy. But this, at the best, can only be guesswork; the reported decisions are in no way imperative for the future and no administrator would be willing to bind his hands in that manner. Unexpected situations and exigencies may arise, political changes or criticisms may supervene, experiments may fail, policies which seemed promising may disappoint and be discarded; and sometimes abrupt reversals are unexplained because they are due to confidential, intra-departmental causes; in short, the administrator insists on keeping his judgment free to adapt himself to new situations. For this reason, Ministerial decisions can never be as reliable signposts as those of tribunals; for though, as I have said, tribunals should have reasonable latitude to review decisions in the light of new considerations, they could not, without stultifying their whole judicial function, assume the same freedom of policy and action as the executive demands.

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[11] In this branch of their work magistrates must be particularly circumspect, for in case of an appeal to the Divisional Court of the Probate, Divorce and Admiralty Division a record of the evidence and the reasons for decision are insisted upon (sometimes with asperity). Mr. Pollard (*British Journal of Administrative Law*, Sept., 1954, p. 51) alludes to a Domestic Proceedings Court in which the chairman devotes " up to five minutes " in stating the main reasons for the court's conclusion. I can only envy this bench. I have known many cases in which five minutes would barely suffice to deal with a single alleged act of persistent cruelty.

[12] *Op. cit.*, 8.

## APPEALS

The reader cannot fail to have been struck by the extraordinary variations in the system—if such it can be called—of appeals from administrative decisions. Appeals lie, if at all, to specially constituted tribunals consisting either of several members or of a single adjudicator, like a judge or the Insurance Commissioner, to referees and umpires, to courts of summary jurisdiction, to the High Court itself, either by special leave or as of right, sometimes within a limited period only, often only on points of law by way of case stated; sometimes there is a dual appeal, as in surcharges by District Auditors or patents or complaints of pilotage candidates (*ante*, p. 76); sometimes the form of appeal, as in the case of the Transport Tribunal (*ante*, p. 36) is cumbrous and antiquated; from the Disciplinary Committee of a Marketing Board the only appeal is by way of arbitration; occasionally we encounter an exceptional provision, like that of the Poor Law Act, 1930, s. 142, that certiorari will lie against a Ministerial order only within a limited time[13]; and frequently there is no recourse at all, unless the aggrieved person can bring his case within the general corrective powers of the High Court—prerogative orders, injunctions and declaratory judgments—which are not appeals at all in the sense of re-hearings. We have seen instances of the draconic exclusion of appeal by a provision that the administrative decision " shall not be called in question in any legal proceedings whatsoever." [14] It has also been remarked—*e.g.*, in respect of war pensions—how the provision of an appeal may be an invaluable reinforcement of common justice, without that extravagant cost which is so much feared. Is it not an extraordinary and discreditable contrast in our law that until 1954 a smallholder like Mrs. Woollett (see *ante*, p. 35) had no appeal against the deprivation of her home and livelihood, whereas the Inland Revenue authorities can drag an appeal through all the courts for a trifling amount of tax? [15]

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[13] Similar limited appeals are to be found in the Local Government Act, 1894, with regard to alterations of boundaries, and in the Public Works Facilities Act, 1930 (First Sched., Part III, para. 2), with regard to compulsory purchase. We have already remarked the appeal limited to six weeks under the Housing Acts, with express exclusion of prohibition or certiorari after that time. The Acquisition of Land (Authorisation Procedure) Act, 1946, First Sched., Part IV, also sets a limit (without specific reference to prohibition or certiorari) of six weeks for appeal to the High Court, but only as far as the Court of Appeal, except by leave of that court for appeal to the House of Lords. In these instances appeal out of the statutory times cannot be maintained: *Uttoxeter U.D.C.* v. *Clarke* [1952] 1 All E.R. 1318. By the combined effect of the Town and Country Planning Act, 1944, s. 16, and the New Towns Act, 1946, s. 1 (2) and First Sched., the time for appeal against New Towns orders is limited to 28 days, is open only to persons "substantially prejudiced," and can be brought only on the grounds of *ultra vires* or non-compliance with statutory requirements.

Again and again judges have urged the desirability of special means of appeal.[16] It is very difficult to understand why the recourse is provided in some cases and not in others, or, if appeal exists, on what principle it is provided. Why should the superannuation of a local government employee be at the sole judgment of the employer, with appeal only to the Minister, who is himself a super-employer? In *Wilkinson* v. *Barking Corporation* [1948] 1 K.B. at p. 728, Scott L.J. observed that in this instance " the remedy conferred makes it almost a contradiction in terms to call it a remedy for the violation of a right." The Lord Justice was referring to the Local Government Act, 1937, and the Local Government Superannuation Act, 1937, and pointed out that under the provisions of those statutes the duty to pay superannuation was " subject to the jurisdiction, not of a court, not of a lay tribunal, not even of an impartial third party, but of the debtor himself ! " The *Northumberland Compensation* case, *ubi sup.*, later showed that grave mistakes can sometimes be made in financial calculations of this and similar kinds, but Scott L.J. had already pointed out in *Wilkinson's* case that in superannuation there was no appeal whatever on any issue of fact.[17] "This state of affairs," he added, "is not consonant with British justice or the rule of law on which British democracy depends for its very existence." What applies to the superannuation of local government employees applies also to teachers. Why, again, should the Minister—the party most interested—be the sole judge of entitlement to superannuation under the National Health Service (*ante,* p. 66) and to insurance benefit (*ante,* p. 66)? These are questions of great concern to many individuals, and it is ridiculous to suppose that a Ministry cannot make mistakes about them. It is equally difficult to see why an alien who is refused naturalisation should not have a right of appeal (as he has in the United States) from the Home Secretary, or why local education authorities and managers of voluntary schools should be completely subject to the *ipse dixit* of a Minister, or why there should be no recourse from the tribunal under the Safeguarding of Industries Act, 1921 (*ante,* p. 44). Appeals under the Town and Country Planning Acts, are, as Mr. S. A. de Smith observes,[18] "almost entirely excluded from the purview of the ordinary courts," although questions arising under these Acts bristle with difficult points of law and fact.

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[14] *e.g.*, the British Nationality Act, 1948, s. 26. Whether this completely excludes prerogative supervision is unsettled: see S. A. de Smith, " Statutory Restriction of Judicial Review," 18 *Modern Law Review* (Nov., 1955) 585. Mr. de Smith is clearly of opinion that the similar provisions of the National Service Act, 1948, with regard to appeals on hardship or conscientious objection do not oust the supervisory jurisdiction of the High Court. I cannot feel confident in the absence of judicial decision, especially in view of *Smith* v. *East Elloe R. D. C.* [1956] 2 W.L.R. 888.

[15] See, *e.g.*, *Moorhouse* v. *Dooland* [1955] Ch. 284. The official argument is that a small individual sum may, as a precedent, involve a large total sum ; but one small dispossession may also involve a large total sum of right and liberty. Mrs. Woollett's helplessness was shared, in a single day, by 23 other persons in the same plight. It is only fair to add that when revenue appeals for small sums are, for the sake of principle, taken " high up," the Crown generally indemnifies the respondent against costs.

[16] See, *e.g.*, Singleton L.J. in *R.* v. *Northumberland Compensation Appeal Tribunal* [1952] 1 K.B. at p. 345, Lord Goddard C.J. in *R.* v. *Brighton Furnished Rent Tribunal* [1950] 2 K.B. at p. 421, and Cassels J. in *Healey* v. *Minister of Health* [1954] 2 Q.B. 221.

As for the desultory methods of assigning appeals to this authority or that, one example may suffice. We saw (*ante,* p. 49) that under the Customs and Excise Act, 1952, proceedings for condemnation of goods come before magistrates' courts, with appeal to quarter sessions. These are most unsuitable tribunals for such jurisdiction, or for drivers' and conductors' licences (*ante,* p. 77), or for "formal investigations" into shipping casualties (*ante,* p. 50). Sometimes, indeed, in so-called appeals, courts of summary jurisdiction have little or no independence of judgment and are used merely as machinery for enforcing executive decisions—*e.g.*, in appeals against interim development prohibitions under the Town and Country Planning Acts.[19] There are other procedures before courts of summary jurisdiction—*e.g.*, those relating to private street works and ejectments from small tenements (under an Act now 115 years old) which may have been legitimate concerns for magistrates in the past but which seem quite inappropriate in modern conditions.

There remains the position of the Minister as an appellate authority, and some aspects of this we have already touched upon. It is not contended that a Minister is always misplaced in this capacity or that Departments are unmindful of judicial responsibility; but there are two fundamental objections which the most earnest effort after fairness cannot surmount. One is anonymity. Nobody seriously supposes that a Minister can personally consider all the appeals which come to his Department. The bulk of the work must be done by civil servants, frequently in a special Appeals Division. There is no reason to doubt that these are generally competent and zealous officers, though of course there is no guarantee of that, and some revelations in the Crichel Down affair have caused perturbing doubts; but however efficient and scrupulous they may be, still they remain, unlike judges or tribunal members, nameless and unknown and therefore exempt from personal responsibility except for such departmental discipline as may be administered to them—and it appears to be extremely mild. In this country we inherit such a strong tradition of the " manifest " nature of justice that the public will never be satisfied with this mystery of departmental adjudication. Edmund Burke says somewhere: " Where mystery begins, justice ends."

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[17] Appeal by way of case stated may lie to the High Court on a point of law.

[18] *Administrative Tribunals at Work,* 117.

[19] See *Swindon Corporation* v. *Pearce* [1948] 2 K.B. 301.

Secondly, a Ministerial or executive decision need not be accompanied by any reasons. They are often given *ex gratia*, but they need not be given. Sometimes the decision is abrupt and bewildering, leaving the impression that it is merely a capricious change of mind or the correction of some departmental *gaffe*. No reason, for example, was given to Mrs. Woollett for the Minister's sudden decision, reversing all previous assurances, to resume possession of the requisitioned land which was her only anchorage. In *Re 56 Denton Road, Twickenham* [1953] Ch. 51, the War Damage Commission, without assigning any adequate reasons, sought to reverse an assessment of compensation which had been quite clear and definite, but the tergiversation was rejected, not without some pained surprise, by Vaisey J. In *Minister of Agriculture* v. *Matthews* [1950] 1 K.B. 148, the Minister, having entered into an agreement with the defendant which he or any other reasonable man would understand to be a legal tenancy of requisitioned land—a tenancy, however, which the Minister had no power to grant—successfully pleaded his own *ultra vires* act in order to evict the defendant. In *Wilkinson* v. *Barking Corporation* [1948] 1 K.B. at p. 728, Scott L.J. said:

> " The section contains no provision as to how, when or where the Minister is to decide. He would be acting with perfect legality if on receiving from the appellant employee a notice of appeal, he asked the two parties for their written statements of their respective cases, and if, after receiving them and perhaps reading them, he wrote to each of them a letter dismissing their appeals without stating any reasons. Even if certiorari would lie to bring up his decision on the ground, for example, that he had not read the

> papers, the section provides no means by which the aggrieved applicant could interrogate the Minister on that head, or find out if he had read them."

The Lord Justice went on to point out that under the superannuation provisions then in question, the Minister had power to deprive an employee of all benefits " in consequence of an offence of a fraudulent character or of grave misconduct." It is most disturbing to reflect that an individual can, without any possibility of appeal on matters of fact, be in such manner deprived not only of moneys to which he may have contributed for most of his life but of character and reputation. Nor can one regard with any greater equanimity the possibility of a medical or dental practitioner being professionally ruined by the " final and conclusive " decision of the Minister of Health, whether it is his own personal judgment or that of an unknown body of civil servants in a departmental Appeals Division. Such procedures are inconceivable under either French or American law.

I do not imagine Scott L.J. to have meant that the fantastic situation which he described represented the way in which things *do* happen—if so, I should respectfully differ from him. The point is that that is the way in which they *can* happen; and they ought not to be possible under any properly safeguarded system of administrative law. Individuals with serious interests at stake cannot be expected to have any confidence in justice thus veiled from view. We saw (*ante*, p. 17) that many matters of complaint under the National Health Service come before hearing officers, who report to the Minister, who—on further report from his advisers—decides the issue. All this judgment done behind a curtain. In American administrative law it is a firm principle that he who hears should also decide. It is a principle with many obvious advantages, for decision, especially on facts, at second and third hand can never be the same as reasoned decision proceeding there and then from the live presentation of a case. This is a doctrine to which, so far, the legislature has paid little heed, despite the fact that ever since *Arlidge's Case* [1951] A.C. 120, it has been, in connection with inspectors' reports, a constant subject of comment by judges, writers and the Committee on Ministers' Powers.

Before that Committee a number of Civil Service witnesses insisted strongly on the desirability of leaving the communication of reasons voluntary and discretionary. Pressed upon the point, none of them could give a really satisfactory reason for this view, and I know of no more striking example of sheer tenacity to departmental habits for their own sake. One distinguished witness was so unconvincing in this matter that he drew sharp protests from the two members of the Committee who (without the least reflection on the impartiality of their conclusions) were the most sympathetic to executive powers. Their comments are interesting: —

> "*Professor Laski*: Would you not agree that to give a decision always without reasons is the very definition of autocracy, and that the giving of decisions without giving the reasons on which they are based is as near autocracy as you can get?
>
> *Miss Ellen Wilkinson*: Would not the Shah of Persia in his medieval days have approved of the views you are putting forward now?"[20]

There was no answer to these pointed questions.

Another practical disadvantage of Ministerial appeals has been the subject of many complaints. It is said that delays are often excessive and most discouraging to the appellant. Here I cannot speak from any personal experience, but the time consumed in official communications is matter of common knowledge, and it is the experience of many whose affairs are urgent to them, but are mere needles in haystacks to their "obedient servants," that correspondence deferred maketh the heart sick. Complaint is made specially of the protracted interval between an inspector's report and the Minister's decision. The Thesiger Committee (*ante*, p. 77) made somewhat light of this (see paras. 184 *et seq.*); Mr. Lyne, in his dissenting opinion (para. 224), having remarked that the complaint was "quite universal," pointed out with force that if the Minister really gave personal attention to all appeals, he was under "the most onerous duty of going through these complex and it may be bulky cases with meticulous care," and that "with the tremendous burden placed on Ministers in these days I see no possibility of delays in decisions by the Minister being anything but undesirably long." The slightest acquaintance with the day-to-day tasks which nowadays fall on Ministers will confirm this view, and it is difficult to believe that a business-like tribunal is not a far speedier method of decision. Long delays in these issues, great and small, between the individual and public authority, affect most unfortunately public confidence in government.

The anomalies of our system, or un-system, of administrative appeals may be illustrated by two cases which came before the Court of Appeal at the same time. When a farmer is under a supervision order (against which he has no appeal),[1] if he fails to improve his methods while he is "on probation" and under directions, the question will arise of his dispossession. Under the threat either of supervision or of dispossession, he is entitled to " make representations to the Minister," who has to be " satisfied " one way or the other before he makes his decision. The Minister, however, does not consider " representations " himself, nor does his Department; the deputy for this purpose is a County Agricultural Executive Committee, and, when the allegation is of bad husbandry, it has been the practice (which has been held to be legitimate) for the Committee to appoint a sub-delegate in the form of a Husbandry Sub-Committee, consisting of some of its own members together with, in many instances, other co-opted persons. Now, section 104 (5) of the Agriculture Act, 1947, makes special provision for the manner of hearing " representations," when they are oral (they may be made in writing). The wording is this:

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[20] *Minutes of Evidence*, 266, Q. 3646.

[1] "The reason is, I suppose," said Denning L.J. (ironically?) in *R.* v. *Minister of Agriculture, ex p. Graham, ubi infra*, at p. 161, "that a supervision order is not regarded by Parliament as being in itself a serious matter." One can hardly suppose that that light-hearted view is held by Members of Parliament (and there are not a few) who themselves are farmers.

" No officer or servant of a county agricultural executive committee, or any sub-committee or district committee thereof shall be appointed . . . to receive representations relating to land in the area of the committee."

The previous subsection refers to " a person appointed by the Minister for the purpose " as the hearing officer to receive representations.

I pause there to suggest that any person of ordinary intelligence reading these two subsections together will conclude that their whole object is to ensure that the hearing officer shall be a person quite independent of the authorities who contemplate dispossession. It would never occur to such a reader, I make bold to assert, that the " person " appointed by the Minister should be the Husbandry Sub-Committee itself.

In *R.* v. *Minister of Agriculture, ex p. Graham* [1955] 2 Q.B. 140, a farmer was threatened with a supervision order and moved for certiorari on various grounds; that with which we are now concerned was that a Husbandry Sub-Committee had heard his representations, in breach, as he alleged, of subsection 104 (5). Now arose a delicate point of literal interpretation. The subsection says " no officer or servant of a county agricultural executive committee, *or any* sub-committee thereof," shall receive representations. It was argued for the Minister that the whole subsection referred to officers or servants, and that the second limb really meant " or [any officer or servant] *of* any sub-committee, etc."—in other words, that a second " of " is implied and must be read into the subsection.[2] The Divisional Court of the Queen's Bench rejected this interpretation and adhered to the literal wording; it followed, therefore, that the sub-committee was precluded from hearing the representations, that this was a radical defect in the proceedings, which consequently must be quashed. The Court of Appeal took the contrary view and held that the second limb of the subsection referred to an officer or servant *of* a sub-committee.

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[2] It was argued *contra* that in that case the second limb, in strict grammar, should have begun with " nor," which is true enough, but can one always expect perfect grammar in statutes?

I suppose that this will always be a *locus classicus* in the verbal interpretation of statutes, and lawyers and grammarians will go on arguing about it indefinitely. The present writer can only express the respectful opinion that the Court of Appeal attached to the subsection the meaning which it really meant to convey, and that seems to him to be the most desirable way of interpreting statutes. But mark the result. It means that a Husbandry Sub-Committee can hear these representations, whereas I would again urge that the whole purport of the section is that they should be heard by an independent third person. On this aspect of the case Devlin J. observed in the court below:

> " What is the advantage of telling the farmer who has been dispossessed, or is proposed to be dispossessed, by a body of men who live in the locality and who already know probably all that is to be known about the subject-matter of the case in question and who have probably heard unofficially all that the farmer has to say, ' If you want to go and make further representations, go and make them to the same people '? That would give him no real sense of satisfaction. But it would, I hope, give him satisfaction if he heard that an independent person with a fresh mind was going into the matter again." [3]

In the Court of Appeal Denning L.J. took a different view and likened the situation to that of an employer who hears what an employee has to say in self-defence before dismissing him. The difference between the termination of a contract of service and the dispossession of a farmer, at the instance of his neighbours (and possibly competitors) is too glaring to need comment. It is indeed a " new thing in English law," to borrow a phrase which the Lord Justice has used elsewhere, that the man with a " stake in the country "—perhaps his only stake, with no alternative except a blank future—should be in the same position as a servant dismissible at will.

Contrast the case which was heard on appeal at the same time, *R.* v. *Agricultural Land Tribunal, ex p. Benney* [1955] 2 Q.B. 140. This was a matter of dispossession, and, as we have seen, in those circumstances there is an appeal to an Agricultural Lands Tribunal.

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[3] Devlin J. also expressed regret at the argument that the hearing officer intended by the Act was merely " an ear-trumpet to convey representations to the Minister." That argument, he said, " shows a failure to appreciate the spirit of the Act as well as the letter of it. . . . It is quite plain that if the body appointed is the sub-committee which has already considered the matter, the ear-trumpet would necessarily be partially blocked." Metaphors are dangerous instruments, and it is to be hoped that the ear-trumpet does not suggest that Ministers of Agriculture are chronically deaf to reason.

In affirming the order, the tribunal purported to apply it to a farm of 155 acres, whereas the plan originally put in concerned only 151 acres. By reason of the four supernumerary acres the decision of the tribunal was quashed. It was pointed out that in spite of the decision of the Court of Appeal, the Minister could start all over again, with a correct plan, and oust the farmer; and the court could only express the hope that this would not happen if the farmer behaved nicely. Denning L.J. spoke in a new tone: " All I can say is that if an English farmer is to be turned out of his farm, which he and his family have worked for generations, it should not be done except with the full authority of Parliament and in strict accordance with all the safeguards and provisions laid down by Parliament." This seems to have been exactly the view of the Divisional Court in *Graham's* case, but unfortunately it was defeated by the invincible toughness of words (those enemies of thought).

Thus in the one case the safeguard clearly intended by a statute is frustrated by a preposition and in the other decision, which possibly will not affect (except in point of further expense to all concerned) the final result, is reversed on a technical and trifling oversight. A foreigner contemplating our system of administrative law might well be perplexed by such a contrast, and it is difficult to believe that it could happen if jurisdiction were committed to an intelligently constituted Administrative Court of Appeal.

## INDEPENDENCE

" The independence of the judiciary " is a word of might among us, recalling battles long ago. But a case like *Terrell* v. *Secretary of State for the Colonies* [1953] 2 Q.B. 482, reminds us of what we are often apt to forget—that this hallowed constitutional dogma is today of very limited application. In the sense in which it figures in the textbooks, it applies only to High Court judges, who cannot be removed from office except by parliamentary action, and in 250 years that drastic step has never been taken against any English judge, though it has been several times threatened. But it is impossible today to think of " the judiciary " as consisting solely of Her Majesty's judges; we have seen that a vast amount of work which is essentially judicial in character and which has become a fly-wheel in our social machinery, is done by adjudicators, whole-time or part-time, of lesser degree than the Queen's justices and commissioners. Every one of them, from county court and colonial judges—whose work is hardly less various and " learned " than that of the High Court—is dismissible at pleasure, apparently whether he has been appointed for an indefinite or a definite term of office. In practice, they are " independent " in the sense that dismissals are extremely rare. One has never heard of a county court judge or a stipendiary magistrate being removed from office for misconduct or inefficiency, though this has happened sometimes with justices of the peace. Certainly and fortunately, it is well-nigh inconceivable that a lesser judicial officer should be unfrocked because he had given decisions inconvenient to the Government in power—though there is an uneasy feeling from time to time that such thorns in the side of authority are not likely to qualify for judicial promotion, if there is any to be had. The heterodox are never viewed with great favour in " the right quarters."

With tribunal chairmen and members the case is different. It is exceptional for them to be actually dismissed, though rare instances occur.[4] But there is a simpler way of dispensing with individuals who are out of favour. Most are appointed for specified periods, which vary considerably. If they are " unsatisfactory," they need not be reappointed, and no reasons need be given for the *congé*—on the contrary, it will probably be delivered with the utmost politeness. There is no remedy against this form of dismissal, and even political protest (which has not been unknown)[5] can hardly avail against the exercise of an undefined discretion. If a question is asked in Parliament about a decision not to reappoint, the calculated restraint of an official answer that it is " undesirable " to state reasons publicly may, with its hint of " I could an if I would," do more harm than good to the discarded individual. Tribunal members are, with few exceptions, not Crown appointees and their tenure of office is in the hands of different authorities. It is unreal, in these circumstances, to speak of their " independence." To some of them it is, except for *amour propre*, probably a matter of little moment whether they remain in office or not, but we have seen that to others, and especially to chairmen of higher tribunals, it may be important. It cannot be in the interest of justice that a chairman who is drawing a substantial salary should be wondering, as his period of office draws to an end, whether or not he is in favour and whether or not he is likely to be reappointed. There would be the strongest possible criticism if any such system prevailed among our High Court judges who are now appointed *quamdiu se bene gesserint*.

I do not wish to suggest that official discretion in appointments and reappointments is in fact exercised capriciously or unconscientiously; but it would be foolish to ignore possibilities of the intrusion of elements, whether personal or bureaucratic, which in other judicial spheres would be considered arbitrary or improper. And, let it be said again, such oblique influences need never come to light.

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[4] On Monday, February 25, 1952, in reply to a question on this point, the answer given on behalf of the Ministry of National Insurance was as follows: " During the last two years the appointment of one chairman of a Local Appeal Tribunal has been terminated. Out of 307 whose terms of office had expired 23 were not reappointed. I do not think it would be proper for me to give the names of the individuals concerned."

[5] See a debate in the House of Lords on National Insurance administration, March 5, 1952 (H.L. Deb., Vol. 175, cols. 516 *et seq.*).

The question has also been raised by some critics of the "tendentious" influence which central authorities may exert, by means of suggestion and "information" short of actual direction, on the judicial policy of tribunals. Thus Mr. George Lach has made serious allegations[6] that the National Assistance Board, under its earlier régime, brought undue pressure to bear on tribunals to pursue policies which the Board favoured. Professor Robson[7] expresses no definite view of these criticisms and the present writer follows his example, not being in a position to express any opinion. Mr. Lach's animadversions, however, have not, so far as I know, received any answer.

The question is not without complications. It is perfectly legitimate for a Department, since it has the best means of taking a general view of a wide field, to issue information which may be helpful to tribunals, which might otherwise not come to their knowledge, and which aims at preserving the greatest practicable measure of uniformity in their determinations. Indeed, a central authority would be failing in its duty if it did not make such information available. Thus the Home Office constantly issues bulletins for the guidance of magistrates, especially about new legislation and recent Statutory Instruments. These are of no binding legal effect, and great care is taken not to appear to dictate or to trespass upon the magistrates' independence of judgment and discretion.[8] Communications made in this spirit are, without any exception which I have ever encountered, of material assistance to justices and their clerks. Again, to take an example from personal experience, during the war it was often a matter of some difficulty to assign suitable employment to conscientious objectors whose chief (and substantiated) objection was to armed conflict. At one time it seemed reasonable to send some of them to the Royal Army Medical Corps (which, however, is not a non-combatant corps) or to the mines, if they seemed physically suitable. Many, in fact, would have been prepared to serve in these spheres (as they did in minesweeping), but at an early stage tribunals were informed by the Ministry that both the R.A.M.C. and most of the mines were unwilling to accept conscientious objectors. Now, it would have been quite wrong for the Ministry to forbid tribunals to make certain kinds of assignments; but on the other hand it would have been merely stupid not to warn them against determinations which could not be carried into effect.

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[6] *Administrative Tribunals at Work*, 36 *et seq.*

[7] *Op. cit.*, 230.

[8] The principle, however, sometimes needs to be emphasised by the courts: see *Buttle* v. *Buttle* [1953] 1 W.L.R. 1217.

There is nothing improper in "guidance" of this kind, and occasionally, as in the instance of Hardship Committees (*ante*, p. 39), it is invested with special authority. But clearly it must be exercised with great discretion, and in the mass of official literature which Departments nowadays put forth there is no small danger that information may amount to suasion, which would be destructive of all judicial independence. There is no space here to discuss the enormous growth of official circulars, directives, bulletins and other literature, but there has been an increasing tendency, which raises serious constitutional issues, for them to assume quasi-legislative characteristics.

## CONCLUSION

If any of the foregoing observations are well founded, and even if the reader disagrees with some of them, I hope that they will at least have convinced him that the judicial side of our widespread and constantly growing administrative law is in a strangely unsystematic condition. It is now an integral and extensive part of the "law of the land," but, for historical reasons, it has grown in such a way, and in latter days of stress so rapidly, that it is sadly lacking in consistency of principle. Here we have been concerned only with the jurisdictional side of it; there is, of course, even more to be said about the legislative and executive aspects of it; but that is a separate study, and for present purposes I have avoided complicating my topic by adding to the endless controversy about distinctions between the judicial, the quasi-judicial, the administrative and the legislative. My object here has been only to give an impression of the very large variety of adjudicating agencies which, over and above the traditional courts of law, are today empowered to decide upon the rights, duties, claims and liabilities of millions of citizens in innumerable different relationships.

I must repeat what I said at the beginning, that the description here offered is only a bare outline. A full examination and review of administrative jurisdictions, and the general effect of the large body of jurisprudence which they are establishing, still awaits the patient researcher, or possibly a collaboration of researchers. I do not see how the task could be accomplished satisfactorily without a great deal of time spent in attending and collating the methods not only of different types of tribunals but of parallel "benches" of the same type. The present scarcity of recorded decisions makes this kind of investigation "in the field" all the more desirable. Were it possible to obtain the same kind of information about the methods and principles of Ministerial decisions, that also would be most illuminating; but at present such knowledge is not available, save in a few instances *ex gratia*, nor, it would seem, is it likely to become so.

It is, I think, only by crystallising the results of some such extensive survey over the whole of our widespread " inferior " jurisdictions that we shall find the guiding principles for setting our administrative law upon a firm and rational basis. The kind of team research work which I believe to be necessary for this task has been done with advantage and success in various fields by some American universities, but it has not yet become usual in this country, largely, no doubt, because the difficulties of time, personnel and finance are formidable.

I hope that such criticisms as I have made will not be regarded as merely destructive. I do not undervalue the work which is being done by administrative jurisdictions, though I believe—and many now seem to be of the same opinion—that the time has come for their overhaul. Since, however, I have ventured a good many criticisms, the reader is entitled to expect constructive suggestions for reform. Various proposals are now current, the most prominent being the establishment of an Administrative Court of Appeal. This, however, I cannot now discuss, first, because limitation of space forbids, and secondly, because I hope to consider it elsewhere. Besides, while these lines are written, a strong Committee, under the chairmanship of Sir Oliver Franks, is in session to consider the working of certain types of tribunals and inquiries. It will have before it a wealth of evidence which is vouchsafed to few students in this field, and its conclusions will, let us hope, prepare the way for reforms in at least one branch of our administrative law which daily becomes more active and far-reaching. It is much to be hoped that any recommendations which it may have to make will command attention, and bear fruit, more speedily than those of some of its predecessors.

# COUNCILS, MINISTERS AND CABINETS IN AUSTRALIA

GEOFFREY SAWER

IN January, 1955, the Prime Minister of Australia, Mr. R. G. Menzies, announced a reorganisation of the Federal or Commonwealth Ministerial system. Hitherto, in both the Commonwealth and state executive governments, Ministry and Cabinet have been synonymous. Mr. Menzies decided to institute in the Commonwealth sphere the modern United Kingdom distinction between the Ministry—all the Ministers—and the Cabinet—a group of senior Ministers who alone meet together to make the collective policy decisions of the Government. This is a convenient occasion for reviewing some features of responsible Cabinet government in Australia.

From 1854 on, the six Australian colonies of the British Crown acquired responsible parliamentary government on the British model [1]; when the states federated in the 1890's, they carried the principle of responsible Cabinet government into the Federal Constitution.[2] Some of the Federal Fathers doubted the possibility of basing a parliamentary executive on the new legislature since, like the Congress of the U.S.A., it included an Upper House, representing the states as such, whose powers were almost co-ordinate with those of the Lower House and were intended to be exercised.[3] The parties to the argument about responsible government killing the federal principle or vice versa have each been proved partly right and partly wrong. The Commonwealth Senate has for the most part operated not as a States House but as a revising chamber dividing on the same party lines as the House of Representatives: hence there has been little difficulty in having Cabinets " responsible " primarily to the Lower House. But Australia has retained a constitutional system which is in many important respects " federal," or which at least has many of the constitutional rigidities of federalism; these have not killed responsible government, but have modified its operation. The federal experiment made no

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* The Author is Dean of the Research School of Social Sciences, The Australian National University, Canberra.

[1] Tasmania and South Australia in 1854 and 1856, by local Acts authorised by the (Imperial) Australian Colonies Act, 1850 (13 & 14 Vict. c. 59); New South Wales and Victoria in 1855 by Imperial Acts (18 & 19 Vict. c. 54, 55); Queensland in 1859 by Order in Council made under 13 & 14 Vict. c. 59 and 5 and 6 Vict. c. 76; Western Australia in 1889 by local Act, validated by a retrospective Imperial Act of 1890 (53 & 54 Vict. c. 26).

[2] Commonwealth of Australia Constitution Act (Imperial), 1901.

[3] Quick and Garran, *Annotated Constitution*, p. 166.

institutional changes in the organisation of the state governments, but it reduced their spheres of operation and more recently their financial autonomy in a manner which has enabled even the most populous and wealthy states to retain a bucolic simplicity in their executive arrangements which the United Kingdom and the Commonwealth have outgrown—not necessarily to the advantage of the latter.

## THE STATES

### *Legal Origins*

This section deals mainly with the states, since the Commonwealth has many peculiar features in legal organisation and practice. As with most British colonies of nineteenth-century origin, the states derived part of their organic structure from prerogative instruments issued by the Crown, and part from statutes of the United Kingdom Parliament; prerogative instruments were most important in the sphere of executive government, but the original constitution statutes dealt more explicitly with Ministerial arrangements than did contemporary United Kingdom usage. The Crown was represented by Governors whose office was created by Letters Patent, whose conduct was regulated by Instructions, and whose appointments were made by Commissions, all resting on the prerogative and issuing under the counter-signature of the Secretary of State for the Colonies.[4] These documents instructed the Governor to obtain the advice of an *Executive Council*, made up of such persons as he chose; two Councillors and a President of Council (the Governor, with provision for acting Presidents in his absence) were to constitute a quorum, and all formal acts and documents were to be executed in Council. This body bears an obvious likeness to the Privy Council in the United Kingdom, but in Australian history it had at first suggestions of the Tudor rather than the Victorian Privy Council, since in the days before representative and responsible government it was an active advising body. It has been retained to this day as a convenient forum for the execution of the most solemn types of executive instrument—Orders in Council, Regulations of the Governor in Council, Proclamations and the like. Since most of the states lack Official Secrets Acts, the oath of the Executive Councillor who is also a Minister may provide—again rather as in the United Kingdom—some guarantee of ministerial secrecy. But it would take very little constitutional ingenuity today to provide forms of administration such that the Executive

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[4] The documents were in common form. A fresh set was issued in 1900, partly to deal with the coming of federation and partly to meet criticisms of their content, which had been particularly strong in the state of Victoria. For examples of the revised forms see South Australian Statutes, 1837–1936, Vol. 8, p. 832.

Councils could be entirely abolished. Their continuation in the early days of responsible government was quite appropriate, since it was not certain how fast the colonies would adopt in its entirety a system of ministerial executives chosen from the parliaments; the gradual rather than the sudden retirement of the Governor's official, active, non-parliamentary Executive Councillors was contemplated as a possibility, although as it turned out the colonists and their parliaments insisted on immediate adoption of fully responsible Ministries.[5] The older status of the Council is still reflected in the case of Tasmania, where the judges are appointed to it, although never summoned to attend meetings. In the other states, only Ministers of the Crown are appointed. In Victoria, Queensland and Tasmania, appointments are for life, but only the Ministers of the Crown for the time being are summoned to meetings; they are members of the Council " under summons." Those no longer " under summons " sometimes regard their membership as a sort of minor local dignity. In New South Wales, South Australia and Western Australia, Ministers resign from the Executive Council when they resign as Ministers, and would be removed by the President of the Council if they did not do so. All state Constitution Acts now recognise and to some extent regulate the Executive Councils—for example by providing that Ministers are *ex-officio* members—but leaving them on a substantially prerogative basis.

*Ministers of the Crown* likewise received full legal recognition from the first, in the constitutions and in special Acts. In this as in other respects the most remarkable document was the South Australian Constitution Act of 1855,[6] which set out a list of Ministers, required that they should be or become within three months of their appointment Members of the Parliament, made them *ex-officio* members of the Executive Council, and recited that such Ministers would be " liable to loss of office, by reason of their inability to become Members of the said Parliament, or to command the support of a majority of Members thereof "—the most explicit statement of the basis of responsible government in any organic document of the period. The South Australian Constitution Act also abandoned from the first the United Kingdom rule originating in the Succession to the Crown Act, 1705, requiring Ministers to seek re-election if appointed to office after their original election.[7] All the other states adopted constitutional provisions which necessitated re-election of Ministers: the Victorian[8] and Western Australian[9] were explicit and taken almost verbatim from the United Kingdom Acts of 1705 and 1707, but in the other colonies the sections on " office of profit under the Crown " were much more obscurely drafted and have to be read in the light of contemporary history before it is seen that the exceptions in favour of " officers liable to retire on political grounds " required re-election.[10] These provisions were amended so as to abolish the necessity for re-election as follows: Victoria 1859; Queensland 1884; Tasmania 1900; New South Wales 1906; Western Australia 1947. (The Commonwealth from the first adopted the principle of no re-election.)[11] Queensland has neatly reversed the traditional provisions about offices of profit under the Crown dating from the U.K. Act of Settlement 1701; there, if the holder of such an office (not being a Ministerial post) is elected to parliament, he automatically vacates not his parliamentary seat *but the office of profit*[12]—a principle which if adopted at Westminster would save many of the special Acts passed to rescue members from the intricacies of the law on this subject.[13]

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[5] For many years the Ministers continued to have titles reminiscent of the officials who preceded them—" Colonial Secretary "; " Colonial Treasurer "; " Commissioner of Public Works," etc. Today the title " Minister for," etc., is almost uniform, but some states retain a " Chief Secretary " with duties analogous to those of the U.K. Secretary for Home Affairs.

[6] Assented to 1856. See ss. 32, 39 and note s. 33.

[7] *Ibid.*, s. 17.

These state constitutions were in general highly flexible, and remain so on the matters now under consideration. Hence there have been no constitutional obstacles to the creation of larger or smaller Ministries, of Honorary and Assistant Ministers, and of Parliamentary Under-Secretaries or Private Secretaries, though actually examples of the last two classes have been very rare. The choice of nomenclature has sometimes been quaint; there are now a number of state " Honorary " Ministers for whom statutes provide regular salaries.[14] All states give legal recognition to the office of Premier (the title adopted by convention to distinguish the State Chief Ministers from the Commonwealth Prime Minister), and after initial hesitations they have included the Attorney-General in the list of responsible Ministers.[15]

Queensland's parliament is unicameral; in the five states with bicameral parliaments, the U.K. principle of primary Cabinet responsibility to the Lower House applies. But claims of Upper Houses—

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[8] 1855, s. XVII.

[9] 1889, s. 29.

[10] N.S.W. 1855, ss. XVIII, XIX; Tasmania 1854, s. XXVII; Queensland at first operated under the N.S.W. Act, and later under Legislative Assembly Act, 1867, ss. 5 and 6. The references to " officers liable to retire on political grounds " were the most explicit recognitions of responsible government in most of these Acts.

[11] Constitution, s. 44.

[12] Officials in Parliament Act, 1945.

[13] See May, *Parliamentary Practice*, 15th ed., at 213.

[14] Tasmania, Ministers of the Crown Act, 1948, s. 3. Others often share a Cabinet salary pool.

[15] Where the office of Solicitor-General exists, it is a non-political civil service post.

especially elective ones[16]—to Cabinet representation, and the necessities of piloting the Government's legislative programme through the Upper House, have produced both a general convention that some Ministers shall be in the Upper House and express constitutional rules on the matter. Thus in Victoria,[17] not more than two Ministers may be in the Legislative Council (Upper House) and not more than eight in the Legislative Assembly, the emphasis being on the Assembly's claims; in South Australia,[18] not more than five shall be in the *Assembly*, the emphasis here being on protection of the Council's position; Western Australia also emphasises the Council's position with a requirement that at least one Minister shall be a member of that House.[19] These provisions apply only to Ministers with Portfolio. Victoria and New South Wales make provision for Ministers from one House appearing in the other House to defend Government Bills, but the N.S.W. section has never been used, and the Victorian one never since 1905.[20]

*Cabinets* on the British model were also established from the first, notwithstanding the doubts of the Colonial office as to whether there existed the necessary party basis for viable Cabinet government. Until the 1890's politics were in fact more a matter of faction and of personal intrigue than of distinct party opposition, and changes of Ministry were frequent; it was often very difficult for the Governors to choose the appropriate person to form a Ministry. In that turbulent atmosphere, there was also a tendency to place less emphasis on British rules of Cabinet solidarity and secrecy and to undermine the authority of Chief Ministers. But the general intention was to follow the United Kingdom principles; the precedents and literature of the Mother of Responsible Government were closely studied, and before federation, the expression " unconstitutional " usually had the imprecise London reference to convention and political morality rather than the present-day precise Australian reference to rigid written constitutional rules.[1]

[16] All now are; for details see this writer's *Australian Government Today.*

[17] Constitution Act Amendment Act, 1947, amending 1928 consolidating Act, s. 15.

[18] Constitution Act, 1953, amending 1949 consolidating Act, s. 65.

[19] Constitution Act Amendment Act, 1899, s. 43.

[20] N.S.W. Constitution Act, 1902, reprinted as amended 1936, s. 38A; Victorian Constitution Act Amendment Act, 1928, s. 18. The N.S.W. section applies only to Assembly Ministers appearing in the Council, the Victorian both ways. One reason for the non-use of the sections is the anxiety of Ministers in the Council to exercise the responsibility of representing Ministers in the other House; they are afraid that appearance of Lower House Ministers would further sap the political virility of the Upper Houses, already regarded by many electors as " Houses of Doddery." Major measures usually originate in the Lower Houses; Money Bills are required to do so. However, the position of the Victorian Legislative Council is now a good deal more powerful, as a result of the introduction of universal suffrage for that House in 1950, and it is possible that the Victorian s. 18 will yet find use.

[1] For the early history of the Cabinets, see Todd, *Parliamentary Government in the British Colonies*, Chap. XVII (1894), and *Official History of N.S.W.* (1883), Chap X.

The United Kingdom shibboleth that Cabinets are " unknown to the law " was likewise often repeated. If this means that Cabinets are not organically regulated by positive law, and that no formal legal acts are required to be performed in Cabinet, the statement is innocuous. But courts can and do take notice of the existence of Cabinets, and what happens or is considered there may become of legal interest, as is illustrated by nineteenth-century state cases. In *R.* v. *Tooth* and *R.* v. *Davenport*,[2] the Supreme Court of Queensland had to decide disputes over the purported cancellation of Crown leases for breaches of the conditions of lease. The lessees claimed waiver. Rent had been accepted after the breaches alleged, and one question was whether this had been done after persons with whose knowledge the Crown could be fixed had become aware of the breaches. A change of government provided the lessees with former Ministers willing to give evidence of what had occurred both in the Executive Council and in Cabinet; when this evidence was tendered, Lutwyche J. upheld an objection by the Attorney-General (for the Crown). As to the Executive Council, he ruled that it would be against public policy to admit evidence of *discussions* in that body: " I should open a door which I do not think would be very easily closed again." A *decision* of the Council could be proved by its minutes, but no specific decision was here in question. As to Cabinet, his Honour said: " The Cabinet . . . is not a body recognised by the Constitution. . . . The deliberations of the Cabinet and the determinations to which the Cabinet may come, are only binding and effectual if they are proposed to be carried into execution, and are ratified, by the action of the Executive Council." [3] He pointed out that the Council might decide differently —an echo from the days when the Council did in reality " advise." [4] He also pointed out that the responsible Minister for Lands might have competently made certain decisions within the scope of his departmental authority, but that nothing would be added to the authority of those decisions by the fact that he had discussed them with fellow Ministers in Cabinet, so that " his colleagues united with him in thinking he was right in acting as he did." These dicta accord with the general traditional notion that to the law the Cabinet is an accidental parley of Ministers and nothing more. But *Davenport's* case went on appeal to the Judicial Committee of the Privy Council,[5] which held (reversing the Supreme Court) that there had been waiver of the breaches so that the leases stood. Their Lordships recited the very evidence of the Minister for Lands concerning Cabinet proceedings which Lutwyche J. had ruled inadmissible—" Having made himself acquainted with the report " (concerning the breaches of condition) " he laid it before his colleagues in the Ministry, and . . . the result of their deliberations was a determination not to proceed for the forfeiture of the allotments," [6] and it was obviously this evidence they had in mind when ruling that rent had been received " not only with full knowledge of the breach . . . but in consequence of the decision of the Ministers of the Crown . . . come to after mature deliberation." [7] In *Toy* v. *Musgrove* [8] the Supreme Court of Victoria discussed very fully the implications of responsible Cabinet government, when considering the validity of exclusion of Chinese by fiat of Cabinet; in this case, however, the Judicial Committee on appeal [9] avoided the problems of basic constitutional doctrine which had divided the Victorian judges, by holding that in any event an alien had no enforceable *right* to enter the Queen's dominions.

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[2] (1874) 4 Q.S.C. 96, 99.

[3] *Ibid.*, at 100.

[4] For a judicial recognition that Executive Council decisions are now purely formal, see *per* Barton A.C.J., in *Smith* v. *Crown* (1913) 17 C.L.R. 356 at 362–363.

[5] (1877) 3 App.Cas. 115.

This submission that Cabinets are known to the law must not be carried too far. Many empowering statutes require in terms the making of a formal decision or instrument by a named authority—usually the Governor in Council, or a Minister—and even if the policy question is first settled by Cabinet, the formal step must still be taken before the decision can be " known to the law." There are no recorded examples of laws which in express terms make Cabinet decision a formal authentication of the governmental will. Such provision could quite well be made so far as constitutional law is concerned, and with the development of Cabinet secretariats and proper records of Cabinet decisions, the practical difficulties would be less than might be assumed, but there are still sound practical reasons for avoiding such a course; a main purpose of ministerial conclave in Cabinet is speed and informality of procedure, and this would be imperilled if the precise terms of a decision had to be worked out in order to constitute a legally effective formal record. But when a legal issue is substantially one of fact, in which acts of the government as a collective person with knowledge and intention become relevant, there seems no reason why Cabinet proceedings should not be proved in a relevant case; they would of course be the subject of qualified privilege for purposes of defamation, etc. Questions whether a Minister had authority to negotiate or vary a contract binding the Crown, and had in fact done so, might provide examples as well as the waiver or estoppel type of problem illustrated by *Davenport's* case.[10]

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[6] At 125.

[7] At 130.

[8] (1884) 14 V.L.R. 349.

[9] [1891] A.C. 272.

[10] *Cf. N.S.W.* v. *Bardolph* (1934) 52 C.L.R. 455, especially the judgment of Evatt J. on trial.

Notwithstanding the size which some state Cabinets have now reached,[11] all have continued without even any suggestion of change the system—natural to small Ministries—of including all Ministers in Cabinet. These bodies have not even adopted regular or standing Committee systems to lessen the load on full Cabinet; they sometimes establish *ad hoc* committees to study particular problems, but even then final decision is always left to full Cabinet. The development of secretarial arrangements has also been slow. None has accepted the principle of admitting officials to Cabinet meetings. The several Premiers' Departments provide staffs which compile agenda, and in some cases see that this is drawn up in a form inviting Ministerial annotation and summary of decision on the various items. This is most highly developed in New South Wales, as might be expected from the size of that Cabinet. Victoria has experimented with an interesting solution which avoids the traditional objections to officials breaking in on the secrecy of Cabinet discussion. Since 1954, statutory provision has been made for a " Parliamentary Secretary to the Cabinet,"[12] who is paid a Ministerial allowance and whose special responsibility is to record decisions and supervise their distribution to Departments concerned; the Premier's Department provides the secretarial staff with which he collaborates. Cabinets have regular weekly meetings, but in addition the geography of state departmental and legislative buildings facilitates continuous informal ministerial consultation in a way which, as we shall see, is not possible in the federal sphere. Even the constituency duties of country Ministers in large and sparsely settled states do not detract from this, since the cultural, social and political life of the states is concentrated in their capital cities—excessively so —and country Ministers can live there for long periods without endangering their contact with the people.

The general United Kingdom Cabinet conventions about the position of the Chief Minister, joint responsibility and secrecy apply, with the same tendency for solidarity and secrecy to break down occasionally under the strain of Cabinet or party splits. The Premiers usually combine with their office that of Treasurer, and the joint position gives them especial power because of the workings of the federal system. Since 1929, the Commonwealth Government has come to play a dominant role in the public finance of the states, and the main institutions in which these relations are negotiated each year are the Loan Council and the Premiers' Conference.[13] The state Premier-

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[11] N.S.W. 15, Victoria 14; Queensland 11; South Australia 8; Western Australia 10; Tasmania 9. (1956. Changes are frequent.)

[12] The office began informally about 15 years ago, when Honorary Ministers volunteered for this duty. See now Parliamentary Salaries and Allowances Act, 1954, s. 5 (*f*).

[13] For further details see J. D. B. Miller, *Australian Government and Politics*, pp. 137–139.

Treasurers represent their states in both these bodies, and have a wide authority to commit their governments on financial questions. (The Commonwealth Prime Minister does not usually hold the Treasury Portfolio, so in that government there is not quite the same concentration of power in the one man. However, the Commonwealth Prime Minister derives an especial authority from his position as the Commonwealth's chief agent in dealings with the other governments of the British Commonwealth, in particular the United Kingdom Government.)

### *Party Pressures on Cabinets*

The Australian party system is extremely highly organised, and although its main dialectics bear obvious relationships to the United Kingdom situation of Conservatives versus Labour, there are unique features which affect the working of Cabinets.

First, in the Commonwealth and in the states of New South Wales, Victoria, Queensland and Western Australia, there are three parties which between them dominate the political life of the country. The Liberal Party (called in Victoria the " Liberal and Country " Party) occupies a position analogous with that of the United Kingdom Conservative Party; the Labour Party corresponds to U.K. Labour; those two are the only parties habitually contesting most of the seats at an election and claiming to be capable of supplying a Government based on their own strength. The Country Party (which exists as a separate force in South Australia only for federal purposes, and does not exist at all in Tasmania) is as its name indicates a " third party " contesting only rural seats and never likely (unless under a grossly gerrymandered electoral system, such as once existed in Victoria) to provide a government except with the support of one of the other parties; but it frequently holds the balance of power. For the greater part of its history, the Country Party has fought elections in more or less close alliance with the Liberal Party, and since 1923 most non-Labour Governments, federal and state, have been coalitions between those two parties.

Thus the making of coalition Cabinets has become a special art, and one in which the traditional British rules about the authority of the Chief Minister have had to be modified. Usually the Liberal partner has the strongest parliamentary following, and provides the Chief Minister. But the Country Party component can usually bargain for Cabinet representation out of proportion to its parliamentary strength, and for virtual equality of leadership between the Liberal Chief Minister and the Country Party Leader; the situation is indicated by the names usually given the federal coalitions—the " Bruce-Page " Governments of 1923–1929, the " Menzies-Fadden " Governments of 1949–1956. The two parties separately select their contributions to the Cabinet,[14] and usually respect each other's choice; one group may, however, raise objections to the choice of the other and thus necessitate bargaining before the list is settled. In the Commonwealth sphere, the Country Party traditionally claims the Treasury and the Post Office. No doubt Chief Ministers in the United Kingdom and in any two-party situation have to negotiate with sub-groups and faction leaders in the course of Cabinet making, but in the Australian situation just mentioned the procedure is more formally organised and the Liberal Chief Minister cannot be said even as a matter of principle to select his Cabinet; he has at the most a veto on the Country Party list, and his ability to allot portfolios is limited. Once formed, these coalition Cabinets usually work on ordinary principles, but at times mutual suspicion between the parties have produced special voting rules on determinations in Cabinet. The most important was that applying to the Bruce-Page Federal Governments; it was agreed that in a Cabinet of eleven, with six Nationalist[15] and five Country Party Ministers, motions should not be regarded as carried if supported only by the Nationalist six.[16]

Secondly, all Australian parties now elect their Leader by secret exhaustive ballot of the parliamentary party (if the position is contested), so that there is never any question as to the person whom the Queen's representative will summon to form a Ministry.

Thirdly, the practice of election of Ministers by secret and exhaustive ballot of the party has been increasingly adopted; the Leader as Chief Minister is left to allot portfolios, and can often successfully run a " ticket " at the party election which will ensure at least a majority of men with whom he can work easily, but the restriction on the traditional British role of Leader is nevertheless very real. It is a system which strengthens the tendency for the party rather than the Cabinet to become a main arbiter of policy, since under it Ministers may regard themselves as answerable more to the party caucus than to the Chief Minister and Cabinet. However, although there is thus a greater tendency for Cabinet to refer critical questions to the party meeting, it is also usual for Cabinet's view to be adopted in the end, since the Ministers constitute a powerful *bloc* in the party meeting and one which has special advantages in information and experience.

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[14] How is discussed hereafter.

[15] Predecessor of the present Liberal Party.

[16] The rule was adopted mainly to placate outside supporters of the Country Party who feared that in a coalition the party would be swallowed. Actually the coalition Cabinets have always divided internally on cross-party lines and it was never necessary to invoke the voting rule; indeed, the exact formulation of the latter is now a matter of dispute. Fears lest the Country Party lose its identity are also shown by rules of the extra-parliamentary organisation requiring the consent of its Central Council—on which M.P.s are in a minority—to the parliamentary party entering coalitions.

Election of Ministers was first adopted by the federal Labour Party caucus in 1908,[17] and has since been uniformly practised by the federal and state Labour Parties. After their formation from 1919 on, state and federal Country Parties have also made constitutional provision for caucus election of Ministers. The Victorian Country Party (which has sometimes formed state Ministries wholly from its own strength with floor support from other parties—the only Country Party to do so)—has occasionally practised the system; the Western Australian Country Democratic League (equivalent to Country Party) has used the system without constitutional provision since 1921 when supplying its components of coalition Ministries. The federal and N.S.W. Country Party's contributions to coalitions have always been selected by the Party Leader.[18] The Liberal Parties and their progenitors have usually opposed the elective principle, but in recent years have been more willing to consider giving it a trial. The Victorian Liberal and Country Parliamentary Party Constitution now provides for election of Ministries; the method was not used when the first government entirely from that party was formed in 1955, but it was used to fill the first Ministerial vacancy in January, 1956. In this case there is an interesting departure from the Labour method; at the initial formation of a Ministry, the choice of *two* Ministers is left in the discretion of the Leader.

## THE COMMONWEALTH

The executive government of the Commonwealth has a number of special features. It is a case of particularly great importance, because of the national and international responsibilities of the Federal Parliament and Government; two world wars, a world depression and the necessities of Welfare-State planning, especially since 1945, have compelled the Commonwealth to exert a much wider range of executive powers than a scrutiny of its legislative powers, and even of its operative legislation, would lead one to expect. The present Coalition Government of Mr. R. G. Menzies (Prime Minister, Liberal Party), and Sir Arthur Fadden (Treasurer, Country Party) is in terms of Australian politics a conservative régime, pledged to the maintenance of the federal structure (which the Labour Party is pledged to destroy), and with a good deal of state-right sentiment at least among its back-bench supporters; it is indicative of the centripetal pressures of the Australian system that in this Ministry there are four Departments—

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[17] For its origins see Dean McHenry in *Historical Studies* (Australia and New Zealand), Vol. 7, No. 25, p. 37. The idea was associated with moves for abandoning the British principle of party-based Ministries altogether, and instead having executives elected by Parliament—somewhat in the Swiss manner.

[18] The question has not arisen in Queensland owing to Labour's long tenure of power there.

Labour and National Service, National Development, Primary Industry and Health—which a constitutional purist would expect only in State administrations, since the strict constitutional authority of the Commonwealth touches only peripherally on the subjects mentioned. Part of this executive exuberance is a carry-over from previous war conditions, or an anticipation of future war conditions; during time of " hot " war, the defence power almost swallows up the rest of the Constitution and gives the Commonwealth direct authority to control most aspects of the national life. Part of it is due to the financial predominance of the Commonwealth, as marked in peace as in war. Part is due to the tendency for problems considered provincial in scope in 1901 to become national in scope. The growth of dominion autonomy has extended the external authority of the Commonwealth, and turned the Ministry of " External Affairs " from a convenient sinecure for Prime Ministers into a key post. The Parliament has grown from an original 105 members to its present 184, and Ministries have grown from an original seven to twenty-two. These problems of scale and weight of responsibility would alone have made probable some divergence from the cosy domesticity of state Cabinet arrangements. But geography, the federal structure, special features of federal party history, and some more or less accidental rigidities of draftsmanship in the Constitution have added to the differences.[19]

The *Federal Executive Council* is purely a statutory creation. The Letters Patent and Instructions of 1900 establishing and regulating the office of Governor-General purported, following the precedent of the state instruments, to authorise establishment of the Council, but legally this was supererogatory.[20] Membership of the Council is at the discretion of the Governor-General, except that Ministers of State of the Commonwealth are *ex-officio* members. In practice, only Ministers are appointed, but they are appointed by separate instruments without term stated, so that unless they resign they remain members for life; this necessitates the same distinction as in some states between members " under summons " (being by convention the Ministers for the time being) and those not so.[1] The function of the Executive Council is stated in section 62 of the

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[19] The Constitution authorises amendment of many of its details by ordinary legislation, but unless a particular section says otherwise, amendment requires a referendum at which the proposal must be accepted by a majority of the people as a whole, and a majority of the people in each of four states: s. 128. This makes for extreme rigidity.

[20] See Commonwealth of Australia Constitution Act, Clause 9 (herein referred to as the Constitution), s. 62; Quick and Garran, *op. cit.*, p. 396; A. Inglis Clark, *Australian Constitutional Law*, 1st ed., Chap. 4; *Att.-Gen.* v. *De Keyser's Royal Hotel* [1920] A.C. 508.

[1] The late Sir William Harrison Moore suggested that membership might be used as a Commonwealth title of honour, like membership of the Privy Council in the U.K. and Canada (*Commonwealth of Australia*, 2nd ed., p. 166); this has not happened.

Constitution as being " to advise " the Governor-General, but as with the state bodies its actual function is in the main to provide a formal occasion for the formal execution of documents which the Constitution or legislation require to be the act of the Governor-General in Council. Nevertheless, its meetings (usually about once a week) are not necessarily entirely formal. This depends on the difficult question of the personal authority or influence of the Governor-General, which can vary with the character and attainments of that officer and with the state of party politics. A strong-minded, able Governor-General accustomed to the exercise of authority and with little liking for the merely ceremonial or social functions of the office, may require that Executive Council meetings be pretty fully informed as to the meaning and necessity of instruments produced for execution. Such demands for clarification are rare, but they have been known to result in changes of opinion among the Minister and officials concerned; of course, if the paper is clarified and the advice pressed, the business then goes through.

This is not the place for a discussion of the Governor-General's personal discretions,[2] but it may be noted that on two questions some Governors-General have insisted that they have a special right to be heard, even though the final decision is Ministerial; those are the exercise of the prerogative of mercy and some questions arising in the administration of the armed forces. Probably the prerogative of mercy is exercisable only because of its specific delegation to the Governor-General by the Queen in her Instructions; there is no doubt, however, that the Parliament could regulate the matter by legislation. The Constitution[3] expressly makes the Governor-General commander-in-chief of the Commonwealth's military forces, and this is a " rigid " provision; it may give the Governor-General a special right to be heard on questions concerning discipline, promotions and awards, subject to any legislative regulation of those matters.[4] The Secretary to the Executive Council, an officer of the Prime Minister's Department, rosters attendance of Ministers at Executive Council meetings, and to the extent that he succeeds in spreading attendance among non-Cabinet Ministers, these gatherings provide some opportunity for the latter to see work of other Departments.[5] How far the Governor-General and his Executive Council may thus play a " real " function in government depends to some extent on party considerations; Labour governments are less likely to encourage it than non-Labour, and the latter are more likely to encourage a "spirited" Governor-General if he is imported than if he is Australian. The present Governor-General, Sir William Slim, has exerted under favourable conditions a particularly strong influence, and personally presides at Executive Council meetings as often as possible.[6]

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[2] See H. V. Evatt, *The King and his Dominion Governors.* The Governor-General now has a personal staff capable of attending to matters of government policy, as well as to the matters of social and ceremonial interest which used to be their main concern.

[3] s. 68.

[4] The problem, unlikely to arise in practice, is whether Parliament could " regulate " the subject to the point of depriving the office of Commander-in-Chief of all significance.

[5] Not such frequent opportunities, however, as Committee and certain Cabinet meetings mentioned later.

The Commonwealth *Ministry* is likewise the creature of statute, and the influence of the various state provisions we have mentioned is obvious; thus, as in South Australia and Victoria, the Constitution requires that all Ministers should be members of Parliament or become such within three months of appointment,[7] and, as in all the states, the number of full Ministers is regulated by Acts of the Parliament.[8] But owing to the extreme rigidity of the Commonwealth Constitution, provisions which were probably intended as narrative and descriptive rather than as rigidly constitutive have, in fact, turned out to be potentially restrictive of the freedom of the Parliament and its Ministries to adapt their practice to changing needs. The chief difficulties that have arisen relate to the appointment of subordinate Ministers (Honorary, Assistant, Parliamentary Under-Secretaries, etc.), and these arise from two sources.

First, sections 64–66 of the Constitution, which provide for the offices, duties, numbers and salaries of Ministers of State, leave in the discretion of Parliament only the number and the salary of those officers; they can be interpreted as giving rigid and mandatory force to a requirement that Ministers shall have departments to administer, and that only such Ministers may share the lump sum appropriated for payment of Ministers' salaries.[9] Even the form of the appropriation may be regarded as allowing the Parliament only to vary the lump sum provided, and not to specify its distribution between Ministers; so far the Parliament has acted on that assumption. There were certainly no great political principles demanding that the Commonwealth should lack Assistant Ministers, or Ministers without Portfolio, or that they should be paid only from a pool, when the Constitution was framed or since, and to apply the maxim *expressio unius, exclusio alterius* so as to produce such a constricting result would be pedantic. On the whole, the High Court of Australia and the Judicial Committee of the Privy Council have leaned against such rigid constructions in the field of legislative and executive powers, although being more strict (and this writer thinks pedantic) in the field of judicial power.[10] But when dealing with a rigid constitution subject to frequent judicial review, governments are naturally timorous and unwilling to incur even the parliamentary criticism of unconstitutional action. Several Commonwealth administrations have included unpaid " Assistant Ministers," but none since 1940; more usually the name " Honorary Minister " is used as a courtesy title for persons whose strict legal position is merely that of members of the Executive Council invited to attend meetings of the Cabinet, and giving unpaid personal assistance to Ministers at the discretion of the latter. From the first federal Ministry, there has been an office with the title of " Vice-President of the Executive Council "; since the 1920's the holder has usually been Government Leader in the House of Representatives, with a special responsibility for applying the closure in its various forms, and a senior member of Cabinet, but he is not as such a Minister.

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[6] Since this article is not concerned with the general question of the powers of Governors, the above deals only with the one point of formal contact between Ministers and Governor. The Governors are also, like the Queen, entitled to be kept informed in a more personal way about the course of Ministerial and Cabinet policy. The Prime Minister sees Sir William Slim and keeps him fully informed about Cabinet business. Sir William and his staff also see other Ministers from time to time and obtain information from them and their permanent heads. Owing to the range and complexity of the matters for decision, a Governor-General determined to exercise his functions with knowledge of their import must be allowed a good deal of flexibility in his contacts with the executive government; the Prime Minister could not possibly spare the time personally to keep him fully informed. However, the Governor-General's main contacts are with the Prime Minister, and the situation involves no threat to Cabinet solidarity. What is said here about Governors-General can apply as much in the state sphere, but there is more likelihood of the Commonwealth post attracting men with the ability and ambition to play a constructive part in government.

[7] s. 64.

[8] Pursuant to s. 65.

[9] This view seems to be held by the present Government; see *per* Mr. Holt, Minister for Labour and a senior Cabinet member, in Commonwealth Parliamentary Debates (herein cited Deb.) 22nd Parlt. (1955) H. of R.1 p. 83.

Perhaps Commonwealth Ministries have been unduly timorous and convention-bound in this matter. Even if interpreted with the greatest of strictness, section 64 of the Constitution does not require that only one person be appointed to administer a Department of State, nor does it say anything as to the allocation of authority between several persons so appointed. Hence, there is no constitutional obstacle to appointing a Minister and an Assistant Minister to administer the Department of Defence, both being " officers " and their respective authority being such as Parliament, or the common sense of Cabinet, dictates, and both paid. If Ministries had the courage to proceed on this principle, it is likely that they could outflank any conceivable judicial obstructions much as they have been able to outflank obstacles to the administrative use of judicial power.[11]

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[10] See this writer's *Australian Constitutional Cases*, pp. 302 *et seq.*, 408 *et seq.*

[11] In the early stages of such an arrangement, personal difficulties might arise from the suggestion that an assistant Minister " shares the administration." It might also be difficult to get assistants to expose themselves to the risk of common informer proceedings under s. 46 of the Constitution, but that is a flexible provision; Parliament could repeal the provision for penalties and as suggested later could itself finally determine the constitutional question under s. 47.

The other difficulty arises from section 44 of the Constitution, which in subsection (iv) and proviso repeats the familiar inhibition against any holder of an " office of profit under the Crown " being a Member of the Parliament, subject to the familiar licence to " any of the Queen's Ministers of State for the Commonwealth." As just indicated, the latter title can be given a very restricted connotation. If persons are appointed to offices not beyond all question Ministries of State under section 64 of the Constitution and paid as such under section 66, they face the possibility of automatic disqualification from holding their seats in Parliament (s. 44), and of actions for penalties at the suits of common informers (s. 46). Sometimes the Commonwealth may wish to appoint Ministers less than " full Ministers " at a salary; sometimes it may wish to pay such persons at least out-of-pocket expenses. What then? This issue was brought to a head in 1952, when the Menzies-Fadden Government appointed four " Parliamentary Under-Secretaries," allocated to particular Ministries; the appointments were made by the Prime Minister after consultation with Cabinet, and the appointees were not provided with salaries but were paid out-of-pocket expenses. These Under-Secretaries were expected to make themselves familiar with the problems of policy of their respective Ministers, to " devil " answers to parliamentary questions,[12] to conduct correspondence on behalf of their Minister, and to receive deputations. They were not to make any decisions nor execute any documents which the law required to be made or executed by a Minister. It was forecast that Standing Orders would be amended so as to permit them to deputise for the Minister on Committee stages of a Bill under his charge, but no such provision was made and no Under-Secretary performed this function. On May 22, 1952, in answer to questions put to him by the Honourable A. A. Calwell, Deputy Leader of the Opposition, the Speaker, Mr. A. G. Cameron, stated that in his view the Under-Secretaries held offices of profit under the Crown within the meaning of section 44 of the Constitution, and had thereby vacated their membership of the House, and that he refused to allocate rooms to them within the parliamentary building. On May 27 the Acting Prime Minister (Sir Arthur Fadden) tabled a statement controverting the opinion of the Speaker; the debate was adjourned and not resumed. The matter was again brought to a head in August, 1952, when some Under-Secretaries, defying the Speaker, occupied rooms in the Parliament and had their titles printed on their doors; apparently the printing of the titles was particularly offensive to the Speaker, who had the notices torn down. The Prime Minister, Mr. Menzies, had by now returned and on August 27 he tabled a statement defending the appointment of the Under-Secretaries, and inviting the House to approve the statement and thereby the appointments. This motion was carried on party lines.[13]

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[12] Not to give them in Parliament; Ministers value too highly this form of publicity —especially since the introduction of radio broadcasting of debates—and probably questioners would make absence of a personal reply a matter for political criticism. If Ministers and Members would accept at least sharing of answers between Minister and assistant, the burden on the former would be appreciably eased.

The debate on this issue covered the customary range of parliamentary irrelevancies, but the main points turned out to be as follows: The Speaker, and the Labour Party supporting him, claimed that on the English precedents interpreting the phrase " office of profit under the Crown," it was not necessary that a Ministerial or sub-Ministerial appointment should actually bring any " profit " to the holder, and that payment of expenses could be a " profit." It was further claimed that the English precedents distinguished between " Under-Secretaries," whose office was normally an office of profit, and " Parliamentary Private Secretaries " who were personal secretaries appointed not by the Crown but by the Minister concerned and paid nothing. The Government claimed that the appointments were neither to an " office," nor to offices " of profit "; they said that not names but substance mattered, and these " Secretaries " performed the functions of the English " Private Secretaries "; further, that they were not offices " of profit," since no fee or salary was or ever had been provided, and payment of expenses was not enough. The Speaker admitted that farming rather than the law was his speciality, and it is clear that the Leader of the Opposition (Dr. H. V. Evatt), a very eminent Australian constitutional lawyer, was not prepared in unequivocal terms to support the Speaker's view on the law.

It is suggested that the Government was half right and half wrong in detail, and wholly right in the issue. The main authorities relied on by both sides were May [14] and the Report of the Select Committee of the House of Commons on Offices of Profit.[15] On these points, May is too condensed and allusive to be wholly satisfactory as a statement of the law.[16] The memorandum by Lord Campion constituting Appendix 2 of the Report of the Select Committee gives a masterly statement on the subject, but even it is slanted somewhat towards the particular problem then before the House of Commons, and hence contains statements likely to mislead an honest farmer. If the cases discussed by these two authorities are considered from the particular point of view necessitated by the Australian problem, the result is as follows: First, if an office has never had attached to it any sort of salary or fee whatever, so that no holder of the office could under any circumstances claim payment of such emolument, then it is not an office of profit. Second, payment of reasonable expenses in relation to carrying out an office does not make the office one of profit; on this more hereafter. Thirdly, if an appointment is made personally by a Minister to provide political assistance for that Minister, it is not a Crown appointment, but if an appointment is made under the authority of the Crown, or of a Chief Minister to the Crown, or of the body of Ministers collectively, and the substantial purpose is to facilitate the work of a Department of the Crown, it is a Crown appointment. The Menzies-Fadden " Under-Secretaries " therefore held offices under the Crown. The Prime Minister could not have his cake and eat it by making their appointments a Cabinet matter and yet treating them as personal appanages of the Ministers in question. In substance, not in name, they were agents of the Crown. A Minister is not acting as such only when making final decisions committed to him or executing formal documents he is empowered to execute; all the work of his Department is potentially " Crown " work, and even the English exception of " Parliamentary Secretaries " is somewhat anomalous, in so far as they go beyond helping the Minister to maintain his political connections with his constituents. But since no fees or salary ever had attached or could attach to the offices, they were not " of profit " unless the out-of-pocket expenses paid could be regarded as such. No doubt a court, especially a court in a federal system accustomed to judicial review on strict lines, could find that an alleged " out-of-pocket expense " contained a concealed fee. But it is equally likely that such a court would not require an audited statement of expenses actually paid, and would be content with a reasonable pre-estimate of likely costs. On that test, the Government was right objectively as well as by majority.[17]

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[13] Deb. Vol. 217, p. 717, 810; Vol. 218, p. 618.

[14] *Parliamentary Practice*, 15th ed., pp. 197 *et seq.*

[15] H. of C. 1940–1941, No. 120.

[16] *e.g.*, in its account of the 1945 Coatbridge and Springburn case, May describes the payments made as " a trivial amount for subsistence and travelling expenses." Actually, provision was made for two distinct payments, one for expenses, the other a fee for doing the work. There seems to be no case where payment of expenses, clearly and solely as such, has been treated as a " profit." (I am indebted to Mr. C. Hook, of the Commonwealth Attorney-General's Department, for drawing my attention to the detail of the Coatbridge-Springburn case.)

Perhaps, too, the Government was *legally* right *because of its majority*. The Opposition claimed frequently during the debate that the House could not settle the matter by resolution; it was a justiciable question. They were challenged to take appropriate court action, but did not do so, and perhaps they were well advised not to do so. Section 47 of the Constitution says that until the Parliament otherwise provides, " any question respecting the qualification " of a Member of Parliament is to be decided by the House in which the question arises, and it is clear from section 44 that the allegation of holding an office of profit under the Crown raises such a question. It may be thought on a first reading that Parliament has otherwise provided in Part XVIII, Div. 2, of the Commonwealth Electoral Act, under which the High Court of Australia, sitting as a Court of Disputed Returns, may decide such matters. But the court's power to decide does not arise unless the House concerned refers the " question " to the court; it is still competent for a House to decide the matter itself instead of referring to the court, and if the House does so, probably its decision would be final for the purposes of common informer proceedings before a court under section 46. If there is any doubt about the last proposition, the Parliament can end it by amending section 46, which is left within the reach of ordinary legislative process.

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[17] Many of the examples cited by Government speakers, however, were irrelevant; for example, the salaries paid to the Speaker, the Chairman of Committees, the Leader of the Opposition and the Whips. These are in no sense offices under the Crown. Somewhat more interesting were second-war cases of Labour administrations appointing M.P.s to assist overburdened Ministers with certain types of public-relations work, such as liaison with trade unions; these Members were given no official title, and were paid a small fixed fee per day when they were engaged on the work as an estimate of expenses. The fees were sufficient to make the posts attractive and so incur the ban of one main ground for the " office-of-profit " rule —namely preventing the Executive Government from having too great an influence with Members. But probably the posts could not be regarded as under the Crown.

Hence, although the rigidities of the Constitution with respect to Ministers may be sufficient to worry the Commonwealth and its legal advisers, it seems that on any view the purely legal difficulties can be circumvented comparatively easily. It is the politics rather than the constitutional law of junior Ministers which Commonwealth administrations have found embarrassing. Such animals do not fit conveniently into Labour Party methods of election of Cabinets. Even the non-Labour parties have sometimes found them an embarrassment; the anti-climax to the argument over the Under-Secretaries whom the Government defended so vigorously in 1952, and who were supposed to be serving a valuable training for future Ministerial office, came in 1956 when out of six new appointments made at a Menzies-Fadden Cabinet reconstruction, not one of the former Under-Secretaries was appointed to Ministerial office and no further appointments of Under-Secretaries or equivalent officers were made at all.[18]

Commonwealth *Cabinets* consist of Ministers of the Crown as described above, and such other members of the Executive Council as the Ministers choose to associate with themselves for purposes of counsel and advice. The Commonwealth, like the states and the United Kingdom, began by concealing the office of Prime Minister from legal view, but like the states has ended by giving it full statutory recognition, with an appropriate Department. The titles and duties of

[18] The position of the Secretaries appointed in 1952 remained at this writing uncertain. On this writer's view, the resignation of the whole Ministry which occurred in Jan. 1956—to facilitate Cabinet reconstruction—involved the resignation or dismissal of the Secretaries, whatever view one takes of their status.

other Ministers have varied from time to time, as has the number of Honorary Ministers.[19] The makers of Commonwealth Cabinets have to cope with a number of special difficulties, as follows:

Firstly, although the Constitution contains no provision requiring ① Cabinet members to belong to any particular House of the Parliament, convention and political necessity require that the Prime Minister should belong to the House of Representatives, that the bulk of the Ministers should be of that House, but that the Senate should have some Cabinet membership unless (what is unlikely since proportional representation was introduced for the Senate in 1949) the governing Party has no Senate members. Senate members rarely consider that they are adequately represented in Cabinet, but with three Senators in the present Cabinet of twelve, and two of the ten non-Cabinet Ministers, they fare reasonably well.[20] It is essential that at least the Government Leader in the Senate should be a member of Cabinet.

Secondly, convention requires that Cabinet should contain at least ② one member from each of the six states. State interests secure representation to some extent through the Senate, as intended by the founders, and also through state or regional blocs on certain issues in the House of Representatives, but on the whole the most effective representation of state interests has been through the Cabinet convention, which has been followed since the first Cabinet. During a Cabinet reconstruction in 1926, the Bruce-Page Government omitted Tasmanian representation, on the plea of making efficiency override state claims; the slight was electorally resented by the Tasmanians at the general election of 1928, and Mr. Bruce (returned with a reduced majority) again found room for a Tasmanian. This attempt at abandoning the state-representation convention has not been repeated, although frequently the smaller states have been given representation only by an Honorary Minister. When constructing his new Cabinet, distinct from Ministry, in 1956, Prime Minister R. G. Menzies interpreted the convention as requiring state representation not merely for the Ministry as a whole, but for the Cabinet as well. On the whole, the convention has not obstructed careers for talents so much as might be expected; it is a wholesome thing for the cohorts from New South Wales, Victoria and Queensland, with their preponderant representation in the Lower House and in Cabinet, to have to hear some voices from the outposts in Adelaide, Perth and Hobart, and the potential ability of the smaller state representatives is indicated by the fact that of the sixteen Prime Ministers since federation, two of the most outstanding[1] have been respectively a Tasmanian and a Western Australian.

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[19] There are no Honoraries in the present Cabinet.

[20] The Senate has 60 members, the House of Representatives 124 (or 122 with full voting rights).

Thirdly, Commonwealth governments are very much hindered in the organisation of their work by the problems of geography. Similar problems exist in all large countries; they press more in Australia[2] because the population is spread thinly around the perimeter of the country; before air transport was established, the poor quality of land transport and, in particular, the diversity of rail gauges was a great handicap. The federal capital, Canberra, is a small country town[3] on the southern plateau of New South Wales inhabited chiefly by civil servants, research scientists and university teachers; it is not even on a main train route, and its social milieu, even more specialised than that of Washington D.C., provides no microcosm of the country as a whole. Hence Members and Ministers have to spend a great deal of their time in their constituencies; their metropolitan foci of organisation and cultural interest are the state capitals, and they are tempted to spend as little time with the Parliament and the Departments in Canberra as they can manage. (Some Departments still remain in Melbourne, federal capital until 1926.) Air travel has greatly mitigated the problem[4]; geography and climate facilitate year-round frequent air services, so that at least Ministers can be brought to meetings with little notice. But not all Ministers—they always contain a proportion of elderly men—relish air travel or are at their best immediately after alighting from a thousand-mile flight, and the dangers of committing too many Cabinet Ministers to one plane were tragically illustrated in 1940 when the second Menzies Government lost three of its best Ministers in the one crash. When Parliament is not in session, there is some pressure to save up business in order to make Cabinet meetings fortnightly rather than weekly, though weekly meetings are usual even then. Certainly there cannot be the constant easy inter-communication between Ministers which characterises United Kingdom and state Cabinet life.[5] Departments are apt to be left to themselves for long periods, which affects the delicate balance between the role of the highly skilled professional official and the more or less amateur tribune of the people—and the federal service attracts a very high standard of permanent official.

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[1] J. A. Lyons (1932–1939, United Australia Party) and John Curtin (1941–1945, Labour).

[2] Area about 3 million sq. m., pop. just over 9 million.

[3] Pop. 33,000. It is about 180 miles from Sydney, 400 from Melbourne, 600 from Brisbane, 700 from Hobart and Adelaide and 2,100 from Perth.

[4] At this writing, only five Members—none of them Ministers—regularly used rail travel. Members have unlimited free travel on railways, and free air travel to and from Canberra as often as they please.

[5] Even in Canberra itself, geography and accommodation problems impede executive co-ordination. Ministers and Members are crowded into a building designed for a smaller Parliament which also houses the National Library; most of the departmental buildings are too distant for Ministers to have their offices in their Departments. A complete new legislative and administrative housing plan is needed, with underground trolley communication such as that of the Capitol in Washington D.C., so that Ministers can be with their Departments and yet have rapid access to Parliament. (The American arrangements are to solve the different problem of legislators who belong to Congressional Committees, but they would be just as useful for Ministerial transport.)

Commonwealth Cabinets have developed a more formal organisation of their structure and business methods than have the Cabinets of the States. The development was accelerated when the administrative responsibilities of the Second World War brought about an increase in Cabinet numbers from twelve to nineteen, and a proliferation of Commonwealth activities which peacetime has not greatly pruned. The main lines of development have been as follows:

Firstly, the introduction of regular or standing committees which deal with regularly recurring types of business and usually make final decisions thereon, saving the necessity for any discussion of them in full Cabinet. Attempts at such committee systems were made even before the Second World War; the most ambitious was in 1938, when Prime Minister J. A. Lyons instituted a " policy committee " of seven senior Ministers, whose task was to advise on general policy. The non-Labour coalition was then beginning to break up from internal intrigues, and this proposal was greeted with scepticism both by Labour and by some Government supporters as an attempt to create an " inner group " in a purely political sense. The scheme was still-born. The early Menzies wartime governments began to develop specialised Cabinet Committees, but it was under the Curtin and Chifley (Labour Party) war governments that such Committees were firmly established and readily accepted by the parties. The main Committees were the War Cabinet, dealing with the external situation in a broad sense, and the Production Executive, dealing with the supply problems of the home front, but full Cabinet meetings were frequent and the most difficult questions always went there, even if largely technical.[6] The system broke down into a disorderly series of *ad hoc* committees during the post-war construction period, 1945–1949, and this tendency has been a recurring problem since. The Menzies-Fadden Governments in power since 1950 have developed four main Committees. The Prime Minister chairs the Economic and the Defence Preparations Committees. The former was, until 1956, called the Prime Minister's Committee, and was concerned to some extent with general policy questions, but economic policy was always its main business and it has now shed its other responsibilities onto the new small Cabinet. The Defence Preparations Committee, especially important since the Korean War started, invites the Chiefs of Staff to its meetings. The Vice-President of the Executive Council chairs the Vice-President's and the Legislation Committees. The former deals with a miscellaneous group of questions not coming within the competence of the other Committees and not important enough for Cabinet; one important chore is settling the detail of Customs Tariff schedules. The latter scrutinises draft Bills to ensure that they express the policy intended to be expressed, and that when so expressed the policy still looks defensible. Departmental experts usually attend with their Ministers at these Committees, whose full Ministerial membership averages eight. However, there is a good deal of flexibility in their arrangements; less than the full membership may be called for some questions, and they may be supplemented for others.[7]

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[6] *Public Administration* (*Australia*), vol. 14 (N.S.), No. 4, p. 193.

Secondly, a highly organised Cabinet secretariat was established in the Prime Minister's Department. Before the Second War, preparation of Cabinet agenda and recording of decisions followed the same artless course as it still does in most of the states. During the war, the absolute necessity for getting the business attended to in orderly fashion and decisions properly recorded led to trusted officials being increasingly taken into Cabinet and Cabinet Committee meetings to act as Secretaries. The Prime Minister naturally supplied the secretariat for full Cabinet, but until 1948 the tendency was for some other Department to supply the staff for the specialised Committees.[8] In 1948, Mr. (now Sir) Allen Brown, a young lawyer with a genius for public administration, became at an extraordinarily early age the Secretary of the Prime Minister's Department, and he established a permanent peacetime system by which both the Cabinet and its Committees were serviced from his Department. The responsibility for preparing the list of business and collecting relevant memoranda or submissions is in the first place with these officers; they also make suggestions as to the distribution of work between Cabinet and its Committees, the final decision on these questions being with the Prime Minister. They also suggest a list of business for particular Cabinet meetings, which may involve deferring certain items, and the Prime Minister also finally decides this question; in the case of the Committees, all the business on hand is listed for the next meeting and it is left to the Committees to defer matters if they have to. Committees can refer questions to Cabinet and vice versa, but it is an unusual event. Cabinet and Committees can also exclude the recording official when they please, but that likewise is an unusual event. The Secretariat then distributes a list of decisions to all

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[7] For example, the Economic Committee frequently throws off a sub-group called the Works Committee, usually not chaired by the Prime Minister, to consider public works programmes.

[8] *e.g.*, the Department of War Organisation of Industry supplied the secretariat for the Production Executive.

Ministers,[9] and also decisions affecting particular Departments to the Permanent Heads of those Departments.

This position has been achieved only gradually. Ministers had to be accustomed to the presence of recording officials; some objected to having them at all, and others wished to keep their own records which might differ from the record of the Secretary. It was only in 1955 that the Cabinet list of business was confined to what a particular meeting could deal with; previously, Ministers had insisted that all business on hand should be listed, which reduced the value of the notice of meeting as a realistic warning of previous thinking required. There were inevitable suspicions that the Prime Minister's Department was " empire building "; this was met partly by tact and partly by *not* building up the Department.[10] The main development has occurred under the Menzies-Fadden régime, but the system now seems sufficiently well established to be continued by Labour—especially since the late J. B. Chifley, last Labour Prime Minister, was working towards some such end and started Sir Allen Brown on his Cabinet Secretariat career.

Thirdly, the establishing of a Cabinet distinct from the Ministry. This is too recent an event for any final judgment about its effectiveness or the likelihood of its lasting. Some federal leaders have for long complained that effective discussion and decision at the executive level is impossible in a body of more than about fifteen, and some put the optimum figure even lower. But efficiency in this sense is not the only criterion of a good Cabinet. Reasonable representation of main opinions, principal Departments and experienced political leadership are also necessary. Probably the increase of the Cabinet from twenty to twenty-two was the step finally pushing Mr. Menzies into the creation of a separate Cabinet this year—or did he decide to follow the United Kingdom example first and take advantage of this step to create more Ministries? He has not told us. The Cabinet now consists of twelve Ministers, and there are ten Ministers outside it.[11] The Ministers not in Cabinet will be drawn into a good deal of group discussion with their senior colleagues through the continuation of the Committee system mentioned above, in which all Ministers participate; for example, the service Ministers (Army and Repatriation) not in Cabinet are on the Defence Preparations Committee, and the Minister for Primary Industry, not in Cabinet, is on the Economic Committee. Ministers not in Cabinet will also figure on *ad hoc* Committees, and one of the dangers the new system will face will be that of ambitious non-Cabinet Ministers trying to organise special Committees on which to press their views. Non-Cabinet Ministers will also be invited to attend Cabinet meetings when problems concerning their Departments, or problems on which they have special knowledge, are under discussion. They receive minutes of *all* Cabinet decisions, and can see on request the submission on which a decision is based.[12] This is all quite sensible and workable while Parliament is in session and Ministers are gathered in Canberra. There will be a good deal more difficulty during the long periods when Parliament is not in session, and Ministers, like other Members, tend to scatter. It will be easier to hold regular meetings of the Cabinet of twelve, but it will be harder to keep the Committee system going. Even before the new system was introduced, Committee meetings were a rarity out of session; if Ministers had to be fetched to Canberra, they disliked sitting around waiting for a Cabinet meeting while some of their fellows attended a Committee meeting, so the tendency was to put all matters into Cabinet. Now it may be that non-Cabinet Ministers will resist coming to Canberra merely for Committee meetings, or that if they do come there will be the same tendency to have everyone available together and make it a Cabinet, so that the distinction between Ministry and Cabinet will be blurred.

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[9] Within 24 hours of the meeting, usually within 12. The record of decisions is as brief and bald as possible. In all these arrangements, Sir Allen has profited from the experience of the U.K. Cabinet Office, to which some of his officers have been seconded.

[10] Staff has remained constant since 1950. This has prevented experiments in organising " follow up " procedures to check the carrying out of policy, a point on which all the Australian Cabinets are weak. Sir Allen Brown has initiated a scheme for seconding senior administrators from other Departments to his Cabinet Secretariat for 2-year periods, so as to provide himself with additional manpower and also create in all Departments a cadre of officers familiar with Cabinet procedure and trained in the most effective way of setting out submissions to Cabinet. This may also enable follow-up techniques to be developed.

[11] Cabinet Ministers receive a higher salary. This form of differentiating between " Senior " and " Junior " Ministers, mainly on a basis of time in office, has existed since 1952. The classification is in the discretion of the Prime Minister.

When the new system came to be debated in Parliament,[13] the issue was unfortunately complicated by an irrelevant political dispute over questions of Ministerial salary. The Labour Party, however, was substantially opposed to the scheme, and it seems likely that a Labour administration would abandon it and seek cabinet manageability by reducing the number of Ministers. Labour Party leaders thought a Cabinet of nineteen quite manageable, and asked why when exercising its more restricted peacetime powers the Commonwealth should require a larger Ministry.[14] The equalitarian principles of Labour make its members suspicious of schemes for " inner groups "; choosing the junior group would raise difficulties for caucus election of Ministers, while leaving the choice to the Prime Minister would increase his authority and so offend against principles of party democracy. The Liberal and the Country Party speakers on the whole supported the scheme, though with reservations and with many criticisms in detail. The limiting factors already mentioned, and considerations of political tact, required the Prime Minister to make some awkward choices. For example, the Ministers for Navy and Air are in Cabinet, but not the Minister for the Army, merely because the latter is a newcomer without special " state " claims. Territories, a relatively minor Department, is in Cabinet because the Minister was the senior Western Australian available. National Development, a somewhat residual Commonwealth activity, is in Cabinet, whereas Social Services, a major Commonwealth activity and one of great political importance, is out. Labour speakers made merry with these and other anomalies, and some Government supporters were glum for similar reasons. In defence of the Prime Minister it must be said that the shock of at once establishing a rational distribution without regard to vested political interests would have been too great. He has made a beginning and there are several directions in which as time passes he can develop the scheme along rational lines. One of the most constructive speeches was that of Liberal back-bencher W. C. Wentworth, who suggested that the main fields of activity of the Commonwealth should be grouped, with a senior Minister, in Cabinet, in charge of each group, and junior Ministers, not in Cabinet, in charge of detailed Departments within each group; an obvious illustration would be a Cabinet Minister for Defence with overall responsibility, and Ministers for Air, Navy and Army working in close association with the Minister for Defence but not in Cabinet. Such a scheme would also help to overcome the constitutional obstacles to having junior or assistant Ministers.[15] Although now very wide, the range of Commonwealth responsibilities is still sufficiently defined to make such an orderly classification of fields easier than in the U.K.; however, in Australia as elsewhere, the practical administrator and still more the practical politician is apt to assume that the concept of practicality implies a certain sweet disorder.

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[12] Circulation and filing of Cabinet papers present difficulties, because Australia has inherited the U.K. principle that the records of one Cabinet should not be available to the next. Whatever justification this rule had in the past, it should now be abandoned. The main business of Cabinet is to carry on and co-ordinate policies which are Departmental in origin, and it is in the public interest that the fullest records should be kept of those policies, and should be available to successive governments. So far as secret party political considerations enter, the claim for concealment is usually not reputable and such considerations of tactics or " low cunning " as might be canvassed should be put forward orally in Cabinet and not recorded at all. In fact, Departmental files inevitably contain a good deal of the material leading to Cabinet submissions, often the submissions themselves, and often a note of Cabinet decision. The Secretariat has not adopted the fiction of the U.K. Cabinet Office, by which Departmental submissions, often left on the files, are called " drafts " and the printed Cabinet submissions, usually virtually identical with the Departmental record, are alone given complete protection from subsequent Ministerial inquiry.

[13] Deb. (1956) H. of R. No. 1, pp. 39 *et seq.*, 57 *et seq.*; Sen. No. 2, pp. 68 *et seq.*

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[14] The views of senior Labour leaders deserve great respect, since they had intensive experience of war administration under maximum pressure. They were joined by some Government supporters in urging that an attempt to differentiate between policy and detailed administration at Ministerial level is a mistake; the best policy comes from bringing together *all* the heads of administration. But although Labour governed with a smaller Ministry, it did so at the cost of putting a grievous strain on particular Ministers. If more Ministers means keeping the nation's leaders alive and fit longer, the increase is justified; perhaps, however, the distribution of responsibility is more significant in this connection than the number of Ministers.

The debate on the Menzies innovation of 1956 suggested that it will not be accepted at once, and may fail to endure. Indeed, the scheme has already been modified on one critical occasion. In February–March, 1956, the Government was under the necessity of taking difficult decisions in the field of economic policy, owing to the unfavourable drift of external balances and a renewed danger of internal inflation. Advisers, pressure groups and political allies gave conflicting opinions as to the steps to be taken; the Coalition once before (1951–1952) found its political popularity slumping very rapidly because of unpopular economic measures, and since on July 1 the control of the Senate passes into the hands of two dissident Labour members,[16] it is not impossible that an election will occur within a period to which the memory of electors will run. The new Ministerial system indicated for this case the following procedure: consideration by the Economic Committee (perhaps augmented, and perhaps after collecting specialised advice from outside experts); consideration by Cabinet; perhaps discussion by joint party meetings (since the political fate of all could rest on the result); final decision by Cabinet. In fact, for party meetings was substituted consideration at a meeting of *all the Ministers*—which might be regarded as a substitute for party, but was felt by most to be a reversion to the old full Cabinet. A non-Cabinet Minister defended this procedure to the writer by pointing out that if a Government decision is going to be of critical importance for the future of the whole Ministry, then the whole Ministry ought to discuss it. There is no reason why the United Kingdom Cabinet system should be slavishly followed, and since twenty-two Ministers is quite a manageable meeting for the discussion of a well-defined issue, this compromise between the two systems is defensible; however, there is the obvious danger that reference to the full meeting of Ministers will become so frequent that the " Cabinet " will become at most a general policy " inner group."

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[15] Doubts about this scheme rest on three main grounds. First, the somewhat similar Churchill scheme for " Overlord " Ministers in the U.K. is said to have broken down—perhaps mainly because it was poorly designed? Secondly, it is doubted whether all junior Ministers would play the game; being in control of the detailed work, they could disregard or at least subtly distort the policy directives of their senior Minister, and of Cabinet. However, difficulties of the latter nature also arise from the differentiation between Cabinet and Ministry. Third, Departments may not always fall into the same groupings for all purposes; for example, Territories is in some respects a " Public Works " Department, and in others related to " External Policy " (with P.M.'s and External Affairs). Hence the Wentworth scheme might produce the equivalent of a rather rigid sort of Committee system, instead of the present very flexible one. Even under the Wentworth scheme, Cabinet would need to include Ministers for reasons other than their relation to Departments—for example, the Senate Leader and the Vice-President.

[16] Under the Senate system of one-half the membership retiring every 3 years, new Senators elected last December take their seats on July 1. The Senate will then have 30 Government supporters, 28 Labour, and 2 " Anti-Communist " Labour (who split with the official Labour Party in 1955). The rigid constitutional voting rule in the Senate is that the President has a deliberative but no casting vote, and when the House is equally divided the question passes in the negative. (Constitution, s. 23.) The remedy for persistent Senate obstruction of Government legislation is a dissolution of both Houses under s. 57 of the Constitution.

This possibility of frequent or occasional meetings of the full Ministry also complicates a question which the Australians will in any event find difficult—namely, applying the rules of Cabinet solidarity to the new system. The United Kingdom precedents [17] suggest that Ministers out of Cabinet have somewhat more freedom to differ from Cabinet policy than do Cabinet Ministers, although not to the point of voting against it. But the limits of that freedom are hard to define, and any very consistent course of criticism would make the position of the Government intolerable. There are some detailed questions here which the U.K. texts do not discuss; for example, does participation in Committee discussion deprive the non-Cabinet Minister of all freedom to criticise the relevant decisions? [18] Presumably participation in a Cabinet discussion, even if only as a " consultant," would do so. In the new Commonwealth system, presumably any decision of all the Ministers should be supported by the Ministers out of Cabinet, but after the decision on economic policy referred to in the last paragraph, a Country Party non-Cabinet Minister criticised the policy and forecast what he considered desirable future policy in a way which even Mr. Gladstone might not have approved, tolerant as he was of such unauthorised policy statements.[19] Australian practice on Cabinet solidarity has in general been less rigid than Westminster's, though somewhat more rigid in non-Labour than in Labour administrations. But under the new Commonwealth system, the relationship of the junior Ministers to the Cabinet and its Committees is probably going to be too close to permit those

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[17] Jennings' *Cabinet Government*, 2nd ed., pp. 222 *et seq.*; Keith's *British Cabinet System*, ed. Gibbs, pp. 97 *et seq.* These authors say nothing explicitly as to the freedom of junior Ministers to *criticise* Cabinet policy, but presumably they must be granted the freedom of Cabinet Ministers plus something.

[18] It might be necessary to distinguish between decisions finally taken by the Committee and those finally taken by Cabinet after a Committee report.

[19] Deb. March 20, 1956 (daily ed.), p. 947; Melbourne *Argus*, March 21, p. 1.

Ministers any considerable latitude; the demand for Ministerial solidarity may be another factor tending to break down the new system, because of correlative demands from junior Ministers for a full share in policy-making.

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# CURRENT SURVEY

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This digest, which has been compiled by the Editor, covers the period from January 1, 1956, to March 31, 1956.

## UNITED KINGDOM

### ARMED FORCES

**Offences**

*Rules of Procedure.* The Army Rules of 1947 (S.R. & O. 1947, No. 2354) have been replaced by a new statutory instrument. This covers arrest, investigation of charges by commanding officer, the convening and procedure of courts-martial and consequential provisions. The main changes are (a) reduction from ninety days to seventy-two days of the period during which a person may be held in arrest before trial without the approval of a convening officer; (b) the bringing of the procedure with regard to closing addresses more in line with civil procedure; (c) provision is made for the occasions on which an accused requests other offences to be taken into consideration; (d) a court-martial at which there is a judge-advocate is enabled to make amendments to charges; (e) the procedure is prescribed for an accused who wishes to petition both before and after confirmation. (Rules of Procedure (Army), 1956 (S.I. 1956 No. 162).)

Parallel and similar new provisions have been made for the Royal Air Force. (Rules of Procedure (Air Force), 1956 (S.I. 1956 No. 163, replacing S.R. & O. 1933 No. 250).)

### CONTRACT

**Crown**

*Subsidy scheme.* The respondent, the Commonwealth of Australia, which during the war years had bought all the Australian wool clip, ceased to do so from June, 1946, and sales by auction were reintroduced. A scheme of subsidies was introduced to enable manufacturers to sell in the home market at the controlled prices. The basis of the scheme appeared from some thirty-six letters in the period 1946–1948 written on behalf of the respondent to manufacturers of whom the appellant company was one. The appellant company contended that the letters constituted a series of contracts—offers which were accepted by a purchase of wool—under which they were entitled to the subsidies, and claimed £176,153. The respondent contended that there were no contracts, that the basis of the scheme was not contractual but administrative and that the letters contained statements of policy and not contractual offers. *Held,* that respondent's contention was correct and the appeal must be dismissed: AUSTRALIAN WOOLLEN MILLS, LTD. *v.* COMMONWEALTH OF AUSTRALIA [1956] 1 W.L.R. 11; [1955] 3 All E.R. 711, P.C. (This case is discussed on p. 8, above.)

## COURTS

### Administration

*Criminal Justice.* The Criminal Justice Administration Act, 1956, provides in Part I for the establishment of new courts at Liverpool and Manchester for criminal trials and for matters connected therewith. Part II contains miscellaneous amendments relating to England and Wales. The recorder, deputy or assistant recorder of a borough having a separate court of quarter sessions is deemed to be a legally qualified chairman for the purpose of extended jurisdiction under the Administration of Justice (Miscellaneous Provisions) Act, 1938. Other sections concern the retirement or removal of the recorder and certain others; the remuneration of temporary recorders; the provision of additional courts of quarter sessions in boroughs; the transfer to the Lord Chancellor or the Chancellor of the Duchy of Lancaster of certain functions of the Secretary of State; the exemption of boroughs with separate commissions of the peace from county contributions for magistrates' courts; minor changes in the constitution of courts for hearing of appeals at quarter sessions in London; and other matters.

### Jurisdiction

*Elizabeth Anima* v. *Akwasi Ahyeye* (*substituted for Kwame Dwaa decd.*); see under GOLD COAST (p. 179, below).

*Limits.* By section 5 (1) of the Increase of Rent (Restriction) Ordinance, 1949, of Kenya, as amended by the Increase of Rent (Restriction) (Amendment No. 2) Ordinance, 1951 " [The Rent Control Board] shall have power to do all things which it is required or empowered to do by or under the provisions of the Ordinance, and in particular shall have power—. . . (*n*) to exercise jurisdiction in all civil matters and questions arising under this Ordinance." The plaintiff sued the defendant in the Supreme Court of Kenya at Nairobi for possession of premises. One of the issues was whether the parties were in the relationship of landlord and tenant or licensor and licensee. The defendants pleaded that this was not a live issue being already *res judicata* of the Rent Control Board in Kenya which had jurisdiction only on issues arising between landlord and tenant and which had made a determination between the parties.

In their Lordships' view, section 5 (1) quoted above did no more than confirm the competence of the Rent Control Board to deal with all civil matters and questions arising under the Ordinance. It did not give to the Board the power to determine what civil matters and questions arose under the Ordinance. The question of the relationship of landlord and tenant could not, therefore, be made *res judicata* by a finding of the Rent Control Board if a superior court decided that the facts to constitute that relationship did not exist.

Their Lordships, being of opinion that the material before them was quite insufficient to establish what was the relationship between the parties, remitted the case to the Supreme Court of Kenya to be tried on all issues other than that of *res judicata*: HEPTULLA BROTHERS, LTD. *v.* THAKORE [1956] 1 W.L.R. 289, P.C.

*Receipts and expenditure.* The Treasury published the Account of Receipts and Expenditure for 1954–1955 of the High Court and Court of Appeal (H.M.S.O. Daily List for January 6, 1956).

## CROWN LIABILITY

### Real Property

*Forfeiture.* Section 11 (1) of the Mortmain and Charitable Uses Act, 1888, provides: " Land shall not be assured to or for the benefit of, or acquired by or on behalf of, any corporation in mortmain, otherwise than under the authority of a licence from Her Majesty the Queen, or of a statute for the time being in force, and if any land is so assured otherwise than as aforesaid the land shall be forfeited to Her Majesty from the date of the assurance, and Her Majesty may enter on and hold the land accordingly." Section 3 of the Mortmain and Charitable Uses Act, 1891, provides: "'Land' in the Mortmain and Charitable Uses Act, 1888, and in this Act, shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, . . ." "Forfeited" in section 1 (1) of the Mortmain and Charitable Uses Act, 1888, is to be construed as meaning "liable to be forfeited" so that there is not an automatic forfeiture to the Crown.

*Per* Lord Morton of Henryton, Lord MacDermott and Lord Cohen: "Land" in section 1 (1) of the Mortmain and Charitable Uses Act, 1888, includes leaseholds and a transfer of leaseholds is an assurance within the Act; consequently (Lord MacDermott *contra* on this point) an assurance of the unexpired residue of a short term is an assurance "in mortmain" within the meaning of that phrase in section 1 (1).

In 1953 the residue of a term of years was transferred to a company incorporated in the Republic of Ireland and having its registered office in Dublin. The company had neither delivered to the Registrar of Companies any documents for registration under Part 10 of the Companies Act, 1948, nor been granted a licence to hold land in mortmain. It was common ground that Her Majesty had taken no steps to enter into possession of the land in question, and it was conceded that, so far as was possible, Her Majesty had disclaimed any interest in the land. *Held,* the transfer to the Irish company did not bring about an automatic forfeiture to the Crown and accordingly the residue of the leasehold term was not vested in Her Majesty the Queen: ATT.-GEN. *v.* PARSONS [1956] 2 W.L.R. 153; [1956] 1 All E.R. 65, H.L. (reversing decision of the Court of Appeal [1955] Ch. 664; [1955] 3 W.L.R. 29; [1955] 2 All E.R. 466; overruling *Morelle* v. *Waterworth* [1955] 1 Q.B. 1; [1954] 3 W.L.R. 257; [1954] 2 All E.R. 673.

## EDUCATION

### Advisory Council

*Revised membership.* The Minister of Education announced the names of the Chairman (Mr. Geoffrey Crowther) and twenty-six members of the reconstituted Central Advisory Council for Education (England) (550 H.C. Deb. *231–232,* March 29, 1956).

### Finance

*Grants to Local Education Authorities.* In calculating the amount of the Main Grant payable to a Local Education Authority, the formula required that "the product of a rate of 30 pence" should be deducted. If this were left unchanged the amount of grant would be reduced from April 1, 1956, when the higher valuations come into effect. To avoid this consequence, for the words "the product of a rate of 30 pence," there is substituted:

"the product of a rate of a number of pence calculated in accordance with the following formula:—the amount, as estimated by the Minister, which a penny rate for England and Wales would have produced for the year 1956/1957 if the valuation lists in force for the year 1955/1956 had continued to be in force, with estimated alterations, for the first mentioned year multiplied by thirty and divided by the product of a penny rate for England and Wales for the year 1956/1957" (The Education (Local Education Authorities) Grant Amending Regulations No. 4, 1956 (S.I. 1956 No. 3)).

## ELECTIONS

### House of Commons

*Invalidity.* At a by-election for the Mid-Ulster constituency in August, 1955, Thomas John Mitchell polled 30,392 votes and Charles Beattie (the only other candidate) polled 29,586 votes. Mr. Beattie then petitioned the

Election Court in Northern Ireland and on October 7, 1955, that court stated: " We hereby certify that . . . we determined as follows: (a) That at the date of the said Election on the 11th day of August, 1955, the said Thomas John Mitchell was incapable of being elected as a member of Parliament and was not duly elected or returned; and (b) That the said Charles Beattie was duly elected to serve in the present Parliament for the said Constituency of Mid-Ulster and ought to have been returned." After Mr. Beattie had taken his seat it was found that he had at the date of the Election been appointed by the Minister of Labour and National Insurance in Northern Ireland a Member of the Panels for Local Tribunals under the National Insurance, National Insurance (Industrial Injuries) and National Assistance Acts of Northern Ireland. Both the National Insurance Acts make provision for the payment of remuneration to members of the Tribunals. The National Assistance Act provides for payment to members " of such travelling and other allowances (including compensation for loss of remunerative time) as the Board may, after consultation with the Minister and with the consent of the Ministry of Finance, determine." The Attorney-General, giving evidence to the Select Committee on Elections, submitted that the word " profit " in the phrase " office of profit under the Crown " means " any payment other than reimbursement of out-of-pocket expenses, including, of course, reasonable subsistence allowances and earnings lost. . . . Remuneration is always profit. Allowances may or may not be. Compensation for loss of earnings is not profit. Compensation for loss of remunerative time may or may not be profit " (Q. 3). He continued, that to a wage-earner paid by the hour " loss of remunerative time " means loss of wages he would otherwise have earned, but " a member who is not a wage-earner may have lost remunerative time without being able to establish that he would have earned any money in that time; that is to say, he would not, in fact, have suffered any loss of income. Consequently in such a case compensation for loss of remunerative time would be a profit " (Q. 5). There was a further complication for, as the Attorney-General said, " the actual terms of Mr. Beattie's appointment excluded the payment of compensation for loss of remunerative time. But if the terms of a class of appointments are governed by statute or by subordinate legislation I do not think that one is entitled to look at the terms of a particular appointment in that class because if the statute or subordinate legislation makes the office as such one of profit, it does not cease to be one of profit because a particular office holder is debarred from receiving profit, for the Crown cannot fetter its future executive action and the bar might always be removed " (Q. 5). The Attorney-General concluded that all the three offices were offices of profit under the Crown and that Mr. Beattie's election was invalid. The Select Committee came to the same conclusion.

Mr. Beattie was also a member of a county committee of agriculture under the Agriculture Act (Northern Ireland), 1949. Since the only payment to members under this Act could be " out-of-pocket expenses (including travelling expenses and subsistence allowances) " this was considered not to be an office of profit.

Mr. Beattie did not, in fact, receive any profit from his appointments and he had neither claimed nor been paid any expenses since at least March, 1953. The Select Committee recommended that a Bill be brought in to indemnify him from any consequences of having acted as a Member of Parliament. Mr. Chuter Ede estimated that the penalties he had incurred in voting totalled £9,500. The Charles Beattie Indemnity Act, 1956 (4 & 5 Eliz. 2, c. 27), received the Royal Assent on March 15, 1956. The Select Committee recommended that, although they were convinced that Mr. Beattie accepted his offices in complete good faith, legislation to validate his election should not in all the circumstances be brought in.

A question of statutory interpretation was raised on the Representation of the People Act, 1949, which provides in section 124 that the determination of an Election Court " shall be final to all intents and purposes." The Select Committee accepted the view of the Attorney-General that in this case these words could not operate to remove from Mr. Beattie any disqualification affecting him so as to make him retrospectively qualified for election.

On February 7, 1956, the Attorney-General moved in the House of Commons: " That Mr. Beattie, returned as a Member for Mid-Ulster, having at the time of his election held certain offices of profit under the Crown, was incapable of being elected or returned a Member of this House, and that this House agrees with the recommendations contained in the Second Report from the Select Committee on Elections." This was agreed to. (For the Second Report, see H.C. 145—I of 1955/1956; for the debate, see 548 H.C. Deb. 1508–1552, February 7, 1956.)

### Northern Ireland

*Invalidity*. As the result of a general inquiry it was found that four Members of the Northern Ireland House of Commons (including the former Speaker) and two Senators were incapable of being returned as Members, having held offices of profit under the Crown at the time of their election. Dr. Eileen M. Hickey was appointed a member of the Advisory Committee for the Belfast Area under the Unemployment Act (Northern Ireland), 1934, and the National Assistance Act (Northern Ireland), 1948. Sir William McCleery was appointed an Assessor under the Reinstatement in Civil Employment Act, 1944, and the National Service Act, 1948. Sir Norman Stronge was appointed Chairman of the Central Advisory Council for the Employment of the Disabled under the Disabled Persons (Employment) Act (Northern Ireland) 1945. Lieut.-Col. H. S. C. Richardson was appointed Chairman of the Enniskillen District Advisory Committee under the same Act. Dr. R. S. Nixon was appointed an Appointed Factory Doctor under the Factories Acts (Northern Ireland), 1938 and 1949. Mr. Henry Fleming was appointed a member of the Rents Tribunal under the Excessive Rents (Prevention) Act (Northern Ireland), 1941 (Cmd. 9698).

The Validation of Elections (Northern Ireland) Act, 1956 (4 & 5 Eliz. 2, c. 35), validates the elections of all these Members except Mr. Henry Fleming who had died. The Act indemnifies these Members (or, in the case of Mr. Fleming, his estate) from any penal consequences.

## FOREIGN AFFAIRS

### Envoys

*Diplomatic immunity*. Under the Diplomatic Immunities Restriction Act, 1955, if it appears to Her Majesty that the personal immunities conferred by law on envoys of foreign Powers exceed those accorded in the territory of any such Power to an envoy of Her Majesty, Her Majesty may by Order in Council withdraw the personal immunities in the case of that Power. The Act also extends to families, servants and members of the official staff. The Diplomatic Immunities Restriction Order (S.I. 1956 No. 84) was made under this Act. In the eleven countries listed in the First Schedule to the Order, the non-diplomatic staffs of H.M.'s Missions do not have diplomatic immunity and so immunity in this country is withdrawn from the corresponding staffs. Their families also lose immunity. The countries are Argentina, Brazil, Finland, France, Laos, Lebanon, Peru, Poland, Switzerland, U.S.S.R., and Yugoslavia. The families of (a) members of the official staff of the envoy of Argentina, being of the rank of Attaché or above and (b) members of the official staff of the envoy of the U.S.A. below the rank of Attaché, also lose their immunities. In the twenty-one countries listed in the Second Schedule to the Order, servants of H.M.'s Missions and, except in Switzerland and Finland, personal servants of the envoy, do not enjoy immunity, so immunity in this country is withdrawn. (For debate, see 549 H.C. Deb. 971–978, February 27, 1956.)

## GOVERNMENT FUNCTIONS AND APPOINTMENTS

### Cabinet

*Membership.* Replying to questions on the inclusion of the Minister of Works in the Cabinet and the exclusion of the Minister of Pensions and National Insurance, the Prime Minister stated that under successive Governments since 1945 the Cabinet had included only about half of the Ministers in charge of Departments; that the choice of the Ministers to be included in a restricted Cabinet of this kind had always rested in the discretion of the Prime Minister of the day; that he felt no greater obligation than his predecessors to explain the factors influencing his choice or to say why a particular Minister was, or was not, included in the Cabinet; and that the powers and responsibilities of a Departmental Minister were not affected by the question whether or not he was a member of the Cabinet (548 H.C. Deb. 29–30, January 24, 1956).

### Civil Service

*Staffs employed.* A Statement has been issued showing the numbers of the Civil Staffs employed in Government Departments on January 1, 1956. They show a total of 636,771 which is an increase of 673 as compared with October 1, 1955. The total includes 250,479 Post Office staffs (Cmd. 9701).

See also under **Security**, below.

### Minister's Functions

*Agriculture.* There have been transferred to the Ministers concerned with agriculture in England and Wales, Scotland and Northern Ireland respectively, acting jointly, certain functions previously exercised by the Minister of Food under Part I of the Agriculture Act, 1947, and functions conferred or imposed on those Ministers acting separately by the British Wool (Guaranteed Prices) Order, 1955 (S.I. 1955 No. 487), and the Potatoes (Guaranteed Prices) Order, 1955 (S.I. 1955 No. 1154). There have also been transferred to the Minister of Agriculture, Fisheries and Food, the functions of the Secretary of State for the Home Department with respect to Northern Ireland under the Cereals (Deficiency Payments) Order, 1955 (S.I. 1955 No. 962). The principal reason for this transfer was that a doubt had arisen, out of the preparation of the Estimates, whether existing powers under the 1947 Act covered operations over the past years; that is, whether the Ministers could act jointly as well as severally (Transfer of Functions (Agriculture) Order, 1956 (S.I. 1956 No. 87); 548 H.C. Deb. 2326–2329, February 14, 1956).

See also under *Wales*, below.

*Board of Trade.* The Standards Department of the Board of Trade has reverted to its former title of Standard Weights and Measures Department to avoid confusion between its functions and those of the British Standards Institution which is concerned with the general standardisation of industrial products.

*Civil Defence.* Under the Civil Defence (Designation of the Minister of Fuel and Power) Order, 1953 (S.I. 1953 No. 1196), the Minister was designated for the provision and supply of electricity over the whole of Great Britain other than the north of Scotland. The Secretary of State has now become the designated Minister for the whole of Scotland and the Minister of Fuel and Power is restricted for this purpose to England and Wales (Civil Defence (Designation of the Minister of Fuel and Power) (Amendment) Order, 1956 (S.I. 1956 No. 235) ). There has been a similar change of designation from the Minister of Transport and Civil Aviation to the Secretary of State in respect of road maintenance in Scotland (Civil Defence (Designation of the Minister of Transport and Civil Aviation) (Amendment) Order, 1956 (S.I. 1956 No. 419, amending S.I. 1952 No. 1859) ).

*Lord Privy Seal.* Answering for the Prime Minister, the Lord Privy Seal said that the responsibilities of the Lord Privy Seal as Leader of the House was to handle the Government's programme of legislation and other Government business in Parliament; and that he would also answer questions in the Commons on atomic energy matters within the field of responsibility of the Lord President of the Council (548 H.C. Deb. 362, January 26, 1956).

*Safety in the home.* Answering for the Prime Minister, the Lord Privy Seal stated that there had been in existence since 1946 a Standing Inter-Departmental Committee on Accidents in the Home which the Home Secretary assured the Prime Minister was working satisfactorily; that the Prime Minister would not be prepared to adopt the suggestion of appointing one Minister with special responsibility; but that the question would be followed up and special attention paid to it (*ibid.* 1813–1814, February 9, 1956).

*Wales.* The Minister of Agriculture, Fisheries and Food stated that the Welsh Secretary's status had been raised and special arrangements made to see that he was brought into consultation on all matters in which Wales had a special interest; that in addition, increased responsibilities on questions of land use had been devolved on him; and that the National Agricultural Advisory Service and the Agricultural Land Service in Wales were responsible to directors in Wales who, in their turn, were responsible to the Departmental heads of their respective services (550 H.C. Deb. *79,* March 16, 1956).

The Minister of Housing and Local Government stated that it was his intention to exercise all his local government functions in Wales and Monmouthshire through his Welsh Office except where such an arrangement presented serious difficulties; and that local authorities were to address all their correspondence and inquiries to the Welsh Office except the following matters: District Audit (except district audit appeals), Exchequer Grants to local revenues (Local Government Act, 1948), Statistical Returns, Administration of the Alkali, etc., Works Regulation Acts, Superannuation of Local Government Employees, Rating and Valuation (Welsh Office, Ministry of Housing and Local Government, Circular No. 75/55 (Wales) ).

## New Towns

*Appointments.* The Minister of Housing and Local Government stated that the periods of appointment to new town development corporations had in the past varied from time to time and from place to place; that to introduce some measure of uniformity, his practice when making appointments was to invite all new members to serve for an initial period of not less than two years and to review the composition of the corporations annually (549 H.C. Deb. 992–993, February 28, 1956).

## Regional Organisation

*Review.* The Minister of Agriculture, Fisheries and Food stated that he had received the report of Sir Arton Wilson's Committee on the regional organisation of his Department; that the Committee recommended a number of changes in the Department's provincial and county organisation all of which he would consider in consultation with county agricultural executive committees and others directly concerned (550 H.C. Deb. *138,* March 22, 1956).

## Research

*Agriculture.* The Agricultural Research Council was created in 1931 as a chartered body established by Order in Council and responsible to a specially constituted committee of the Privy Council. Its present chairman is Lord Rothschild. When set up its main function was to advise agricultural departments about their programmes with the institutes then financed from the

Development Fund. The Council began to carry out research itself and a new group of institutes grew up directly financed by the Council. The Council also financed directly a number of research units, mainly in University departments. It also made special grants for research work by individual workers and training grants and travelling fellowships for post-graduate work. The institutes formerly financed from the Development Fund became the responsibility, for administrative and financial purposes, of the Ministers for Agriculture in England and Wales and in Scotland.

The main purpose of the Agricultural Research Act, 1956, is to unify all agricultural research under the Council and to transfer the financial and general administration of the institutes in England and Wales grant-aided by the Minister of Agriculture, Fisheries and Food, to the Council. The Act does not apply to Scotland. The Act provides that the Council shall be charged, subject to any directions from time to time given by a Committee of the Privy Council for agricultural research, consisting of the Lord President of the Council and such other members as Her Majesty may from time to time appoint, with the organisation and development of agricultural research, and may in particular establish or develop institutions or departments of institutions, and make grants, for investigation and research relating to the advancement of agriculture. The Act sets up an Agricultural Research Fund. The Council is to make an annual report to the Committee of the Privy Council and this is to be laid before Parliament. The Committee will, in practice, have as its members the Minister of Agriculture, Fisheries and Food and the Secretary of State for Scotland. The Fund will be separate from the Treasury Vote (which has hitherto provided the grant to the Council), the Council will itself be accountable for its expenditure and the Secretary of the Council will be the accounting officer for the Fund (4 & 5 Eliz. 2, c. 28; 547 H.C. Deb. 1145, December 13, 1955).

### Security

*Conference.* On November 23, 1955, the Prime Minister announced the setting up of a Conference of Privy Councillors "to examine the security procedures now applied in the public services and to consider whether any further precautions are called for and should be taken." The members were: the Lord President of the Council, the Lord Chancellor, the Secretary of State for the Home Department, the Lord Jowitt, Mr. H. Morrison, Mr. G. R. Strauss and the Permanent Secretary to Her Majesty's Treasury (546 H.C. Deb. 1466–1468, November 23, 1955).

A statement has been made on the findings of this Conference which presented a Report with recommendations to the Government. The statement records that the Conference pointed out that today the chief risks were presented by Communists and their sympathisers. The Conference concluded that there was nothing organically wrong and unsound about the Government's security arrangements. The Conference recognised that great importance must be paid to character defects and that Departments must inform themselves of serious failings such as drunkenness, addiction to drugs, homosexuality or any loose living that might seriously affect a man's reliability. A serious character defect might appropriately be the determining factor in a decision to dismiss a particular individual or transfer him to other work. The Conference recommended that it should be recognised that the fact that a public servant is a Communist not only barred his employment on secret duties but might also in some Departments have an unfavourable effect on his prospects of promotion. The Conference recommended that an individual who was living with a wife or husband who was a Communist or Communist sympathiser might, for that reason alone, have to be moved from secret work. The Conference approved the Tribunal (commonly known as the Three Advisers) set up in 1948 to hear appeals from civil servants threatened on security grounds with transfer or dismissal. The Conference recommended that no additional powers should be sought to detain suspects or to prevent them from leaving the country. The Conference reviewed the existing procedures for the security of secret Government contracts involving persons outside Government employment and whether such persons should have the right to have their cases considered by the Three Advisers. The Conference recommended that this matter should be first discussed with the National Joint Advisory Council.

The Government propose to give effect to all the recommendations which the Conference made.

(Statement on the Findings of the Conference of Privy Councillors on Security (Cmd. 9715).)

**Treasury**

*Machinery of Government.* On March 23, 1956, Major H. Legge-Bourke moved in the House of Commons: " That this House considers that a comprehensive review of the machinery of Government should now be instituted with a view especially to deciding the correct role that should be played by the Treasury in the implementation of defence decisions." After a debate the motion was by leave withdrawn (550 H.C. Deb. 1695–1740, March 23, 1956).

## HIGHWAYS

**Right of way**

*Evidence of user.* By section 1 of the Rights of Way Act, 1932, a way over land which has been actually enjoyed by the public as of right and without interruption for twenty years is deemed to have been dedicated a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The period of twenty years is to be deemed and taken to be the period next before the time when the right of the public to use the way shall have been brought into question. The owner of the land brings the right of the public to use the way into question if he endeavours to turn back people who wish to use it; it is unnecessary for a member of the public to bring an action or otherwise assert the right.

There was evidence that a path over the appellant's land had been used by members of the public without interruption from 1885 to 1931. From 1931 until 1937 the appellant's predecessor in title, and from 1937 the appellant, made no attempt to prevent local residents from using the path, but if any other member of the public were seen thereon by either of them, he was told that he had no right to be there. Both thereby showed an intention not to dedicate the path as a highway for the use of members of the public at large. There was no evidence that any member of the public questioned the right of either of them thus to prevent the use of the path. The appellant applied for a declaration that no public right of way existed over the path, which had been delineated upon a provisional map prepared by the respondents. The appeals committee of Hampshire Quarter Sessions were of opinion that the period of twenty years referred to in section 1 of the Rights of Way Act, 1932, meant, on the facts, the period immediately before the first occasion in 1931, when it was proved to their satisfaction that the then owner had objected to the use of the path by persons who were not local residents. They accordingly determined that a public right of way was deemed to have been dedicated by virtue of section 1 and dismissed the application. *Held,* (1) Quarter Sessions were right in holding that the material time when the right was brought into question was some time in 1931; (2) (Stable J. dissenting) the Rights of Way Act, 1932, was a procedural Act which was accordingly retrospective in its effect, and accordingly it was no objection that the period of twenty years over which the public were to be deemed to have acquired a right of way terminated before the Act came into force.

*Quaere,* whether the term " local residents " was not so wide that user by local residents of a way was not user by the public: FAIREY *v.* SOUTHAMPTON

County Council [1956] 2 W.L.R. 517; [1956] 1 All E.R. 419, D.C. (Stable J. dissenting) (applying *Att.-Gen. and Newton Abbot R.D.C.* v. *Dyer* [1947] Ch. 67; 62 T.L.R. 632; [1946] 2 All E.R. 252).

## Housing

### Subsidy

*Condition.* Section 3 (2) of the Housing (Financial Provisions) Act, 1924, provides: " . . . Houses, the construction of which is promoted by a local authority in accordance with section 2 of the [Housing, etc., Act, 1923] . . . shall be deemed to be subject to special conditions if . . . the local authority . . . undertake . . . that the following conditions will be complied with in relation to the houses: . . . (*c*) that no house shall be sold . . . except with the consent of the [Secretary of State]." In respect of houses so promoted the local authority was entitled to an annual subsidy from the Treasury. Section 3 (2) of the Housing (Financial Provisions) Act, 1924, does not prevent the owner of a house within its terms from selling it without the consent referred to, but, on a sale, the annual subsidy ceases to be payable in respect of the house sold.

*Per* Viscount Simonds: "The right of an owner of property freely to dispose of it is so inherent in ownership that I should not regard it as displaced except by very clear words."

The respondents, who were private builders, were in receipt of subsidies from the appellant corporation in respect of houses which they had built on the terms that each house should comply with section 3 (2) (*c*) of the Housing (Financial Provisions) Act, 1924. The respondents raised an action to have determined their right to sell the houses. *Held,* (1) the Act contemplated the sale of houses without the consent of the Secretary of State, section 3 (4) making specific provision for the event of failure to comply with any undertaking given under the section; on such an event happening, the Secretary of State might reduce or withdraw his future contributions; and (2) it could not be said that there was a contractual agreement between the parties that the houses would not be sold without the consent of the Secretary of State: Glasgow Corporation *v.* Western Heritable Investment Co. [1956] 2 W.L.R. 717; [1956] 1 All E.R. 706, H.L. (This case is discussed on p. 9, above.)

*Statutory powers.* The Housing Subsidies Act, 1956, empowers the Minister of Housing and Local Government to introduce new housing subsidies, and to abolish or reduce subsidies. It fixes the rate of annual subsidies, distinguishing between those provided for slum clearance and certain other projects on the one hand (being in the case of a house £22 1s. or £24) and the remainder on the other hand (being in the case of a house £10) with additions for agricultural dwellings. The Minister may in certain cases pay increased subsidies. The statutory duty to make rate fund contribution is removed.

Section 11 (1) of the Housing Act, 1936, provides that where a local authority are satisfied that a house is unfit for human habitation and is not capable at a reasonable expense of being rendered so fit, they shall serve upon the person having control of the house, on the owner and on other persons, notice of the time and place at which the condition of the house and any offer with respect to the carrying out of works, or the future user of the house, which such person may wish to submit will be considered. Subsection (3) provides that the authority may accept an undertaking from any owner or mortgagee that a house will not be used for human habitation until the authority, being satisfied that it has been rendered fit, cancel the undertaking. Section 156 (1) provides that nothing in the Rent Acts shall be deemed to affect the provisions of this Act of 1936 to prevent possession being obtained of any premises in respect of which such an undertaking has been given.

The plaintiff had given the undertaking referred to, but no notice of " time and place" had been served on him. *Held,* that in the absence of the notice, the plaintiff's undertaking was not an undertaking under section 11 (1) so as to remove the protection of the Rent Acts: TONKING *v.* SALMON [1956] 3 C.L. 172.

## INQUIRIES

### Transport

*Air.* The Report has been published of the Court Investigation into the accident on January 16, 1955, to Viscount G-AMOK which occurred at London Airport. The Report is dated August 24, 1955 (C.A.P. 130).

The Report has been published on the accident on September 21, 1955, to Argonaut G-ALHL near Idris Airport (Tripoli). The Report is dated October 15, 1955 (C.A.P. 134).

The Report has been published of the Chief Inspector of Accidents on the accident on June 22, 1955, to Dove G-ALTM at London Airport (C.A.P. 133).

*Railway.* The Report has been published on the accident on July 2, 1955, at Mingledale Public Level Crossing in the North Eastern Region. The Report is dated November 25, 1955.

The Report has been published on the derailment on September 1, 1955, at Westwood Junction near Peterborough in the Eastern Region. The Report is dated December 16, 1955.

*Shipping.* The Report (No. 7987) has been published of the Court on the stranding of the S.S. *Bobara* of London on the coast of Anglesey on January 24, 1955. The Report is dated December 9, 1955.

The Report (No. 7988) has been published of the court on the loss of the motor vessel *Tresillian* on November 30, 1954, in the North Atlantic. The Report is dated December 22, 1955.

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (p. 173, below).

## LOCAL GOVERNMENT

### Finance

*Borrowing.* The rates of interest to local authorities borrowing from the Local Loans Fund from March 24, 1956, have been raised to 5⅝ per cent. for loans for not more than five years and 5½ per cent. for more than five years (Treasury (Loans to Local Authorities) (Interest) (No. 2) Minute, 1956 (S.I. 1956 No. 431, revoking S.I. 1956 No. 39)).

The Local Authorities (Stock) Regulations, 1934 (S.R. & O. 1934, No. 619) have been amended, first, by the revocation of the provisions requiring that the Minister's consent to the creation of stock should be expressed in an order and, secondly, by assimilating the rate of accumulations payable to stock sinking fund accounts to the rate of accumulations payable to other sinking funds under the general provisions of the Local Government Act, 1933 (Local Authorities (Stock) Regulations, 1956 (S.I. 1956 No. 327)).

The Local and Other Authorities (Transfer of Stock) Regulations, 1949 (S.I. 1949, No. 1562), relating to the transfer of stock issued by authorities to which Local Government Act, 1948, s. 125, applies, have been amended. The registrar is now given a discretion about retaining instruments of transfer where formerly he was under a duty to retain them; and the execution of a transfer may now be witnessed by the spouse of a party to it (Local and Other Authorities (Transfer of Stock) Regulations, 1956 (S.I. 1956 No. 328)).

*Expenditure.* The Ministry of Housing and Local Government stated on February 17, 1956, in accordance with the statement of the Chancellor of the Exchequer of the same date, that apart from the particular cases of housing and education for which other measures were being taken and except certain major works on roads, loan sanctions would be severely restricted for at least the following six months (Ministry of Housing and Local Government Circular No. 10/56; for the statement by the Chancellor of the Exchequer, see 548 H.C. Deb. 2675–2687, February 17, 1956).

The Local Authorities (Expenses) Act, 1956 (4 & 5 Eliz. 2, c. 36), provides that in England and Wales the council of any county, county borough, metropolitan borough or county district may (*a*) defray any travelling or other expenses reasonably incurred by or on behalf of any members or officers of the council in making official or courtesy visits, whether inside or outside the United Kingdom, on behalf of the council; (*b*) defray any similar expenses incurred in the reception and entertainment of distinguished persons visiting the authority and of persons representative of or connected with local government or other public services whether inside or outside the United Kingdom and in the supply of information to any such persons. In the case of a visit within the United Kingdom, the amount defrayed in respect of a council member must not exceed the travelling or subsistence allowances payable under the Local Government Act, 1948, s. 113.

*Rating and valuation.* The effects of the new valuations for rating may be seen in Distribution of Rateable Values between Different Classes of Property in England and Wales (Cmd. 9718). The figures are not final, first, because the valuations are subject to appeal and, secondly, because the revaluation of Crown property has not yet taken place (550 H.C. Deb. 72, March 15, 1956).

The Industrial Rating Bill received a Second Reading on March 16, 1956. This is a Private Member's Bill providing for the repeal of the sections in the Local Government Acts of 1929 which introduced the derating of industry. Government spokesmen opposed the Second Reading (550 H.C. Deb. 689–786, 787–788, March 16, 1956). And see next paragraph.

*Review.* The Minister of Housing and Local Government stated that the Government were making a comprehensive review of local government finance; that he did not expect to be able to announce conclusions for several months; that the review would include an examination of derating and that it would entail consultation with the representatives of local authorities (549 H.C. Deb. 194–195, February 21, 1956; *ibid.*, *232*, March 9, 1956; 550 H.C. Deb., *72*, March 15, 1956).

### Liability

*Recreation grounds.* In the course of a case brought against a local authority for injuries suffered by a child playing on a chute in a public recreation ground, Singleton L.J. said: " More and more as the years go on local authorities are encouraged to extend recreational facilities and amenities, and they do so. It is in the interest of the people. In the ordinary case of a small recreation ground . . . it is not their duty to provide a groundsman or keeper. . . . Nor do I think it is their duty to put up notices: ' Children under five '—or whatever the age may be—' not permitted upon the chutes or swings.' . . . Nor is it the duty of the local authority to provide nurses for young children who go to recreation grounds. The parents of young children still have some responsibility ": DYER *v.* ILFRACOMBE URBAN DISTRICT COUNCIL [1956] 1 W.L.R. 218 at 228; [1956] 1 All E.R. 581 at 589.

### Members

*Disqualification.* Local Government Act, 1933, s. 59 (1) (*a*) provides: " . . . a person shall be disqualified for . . . being a member of a local authority if he holds any paid office . . . in the gift or disposal of the local authority." A teacher in a county school in a borough which is an excepted district under the Education Act, 1944, Sched. I, Part III, para. 4, and whose appointment is made to the service of the county council by the governors of the school in consultation with the headmaster holds a " paid office . . . in the gift or disposal" of the borough council where that council is required to confirm the appointment.

An information was preferred against the defendant that he acted as a member of the Lowestoft Town Council, he being disqualified for so acting under the Local Government Act, 1933, s. 59, which is made penal by section 84 of that Act. *Held*, that the defendant was so disqualified and had been rightly convicted: LAMB *v.* JEFFRIES [1956] 2 W.L.R. 366; [1956] 1 All E.R. 317, D.C. (Stable J. dissenting). Answering a parliamentary question on this decision, the Minister of Education refused to introduce amending regulations or legislation to nullify it. The Minister said he would have to look into the question whether, in the circumstances of this cases, the teacher would be eligible for membership of the county council (549 H.C. Deb., 2302, March 8, 1956).

*Voting rights.* Under the Local Government Act, 1933, s. 76, the Minister of Housing and Local Government may remove disabilities on councillors from speaking or voting on matters in which they have an interest. The Minister has stated that in exercising their discretionary powers the policy normally followed by successive Ministers has been to allow councillors, who are tenants of council houses, to vote on questions affecting rents only where half or more of the members would otherwise be disqualified; that many councils were likely, in the near future, to be reviewing their rent structure and in some cases, the inability of even a small number of members to vote might result in the adoption of a policy to which the majority of the council were opposed; that that would obviously be most undesirable; and that he would inform local authorities that where, in their opinion, this was necessary to avoid such a situation, he was prepared to consider sympathetically an application for the removal of the disability to vote, provided that the application was supported by a resolution of the council concerned (549 H.C. Deb. 996–997, February 28, 1956; see also 550 H.C. Deb., 825–826, March 19, 1956).

### Reorganisation

*Statement.* The Minister of Housing and Local Government stated that he hoped to make a statement of his proposals "shortly" (548 H.C. Deb., 5, January 24, 1956) and that the Government had decided to issue a White Paper "as soon as practicable" (549 H.C. Deb., *188*, March 6, 1956).

See also EDUCATION (p. 141, above), HIGHWAYS (p. 147, above), HOUSING (p. 148, above).

## MONOPOLIES AND RESTRICTIVE PRACTICES

### General

*Annual Report* by the Board of Trade for the year ending December 31, 1955, has been published in pursuance of the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, s. 16. The Report shows that during 1955 the Monopolies and Restrictive Practices Commission made five reports on the following subjects: semi-manufactures of copper and copper-based alloys, pneumatic tyres, sand and gravel in Central Scotland, hard fibre cordage, and collective discrimination. At the end of 1955, eleven subjects were before the Commission on one of which (linoleum) the report was received on January 16, 1956. The remaining ten subjects are: electrical and allied machinery and plant, certain industrial and medical gases, standard metal windows and doors, certain rubber footwear, electronic valves and cathode ray tubes, equipment and fittings for electrical street lighting (excluding electric lamps), steel frames for buildings, tea, electric batteries, and chemical fertilisers. The Commission are also carrying out a general inquiry into Common Prices and Agreed Tendering (H.C. Deb., 201 of 1955–1956).

*Restrictive Trade Practices Bill.* This Bill provides for the registration of restrictive agreements and arrangements. The Registrar of Restrictive Trading

Practices would be appointed by the Crown and would be responsible for maintaining the register and for taking proceedings before the Restrictive Practices Court. This court would consist of three puisne judges of the High Court nominated by the Lord Chancellor, a judge of the Court of Session, a judge of the Supreme Court of Northern Ireland, and not more than nine lay members appointed by Her Majesty on the recommendation of the Lord Chancellor. The court might sit in divisions with a judge and at least two other members. The opinion of the judge or judges on any question of law would prevail. An appeal would lie to the Court of Appeal or the Court of Session on a question of law. The court would have jurisdiction to declare whether or not certain restrictions were contrary to the public interest; if so, the court might make appropriate orders. A restriction would be deemed to be contrary to the public interest unless the court were satisfied of one of seven general propositions, *e.g.*, that the restriction was reasonably necessary for the protection of the public.

The Bill also declares unlawful agreements for the collective enforcement of conditions as to resale prices. Breach of this clause would lay an offender open to civil but not criminal proceedings.

The Bill amends the Monopolies and Restrictive Practices Act, 1948, by excluding from the jurisdiction of the Commission agreements which are within the jurisdiction of the new court. There are other amendments.

The Bill has received its Second Reading (549 H.C. Deb., 1939–2062, March 6, 1956).

### References

*Petroleum.* The President of the Board of Trade stated that he was not prepared to make a statement at the moment on the question of referring the petroleum industry to the Commission (548 H.C. Deb., 1056–1057, February 2 1956) and that he was not proposing for the time being to make any further references to the Commission (*ibid.*, 346, January 26, 1956).

### Reports

*Heavy electrical plant.* The President of the Board of Trade expects to receive the Report of the Monopolies Commission about the middle of this year (548 H.C. Deb., *285*, February 16, 1956).

*Radio valves, television tubes and electronic equipment.* The President of the Board of Trade expects to receive the Report of the Monopolies Commission in the second half of this year (550 H.C. Deb., 1956, March 27, 1956).

*Sand and Gravel in Central Scotland.* The Report of the Commission has been published (H.C. 222 of 1955–1956) and see next note (on *Tyres*).

*Tyres.* The Parliamentary Secretary to the Board of Trade stated that the Government proposed to take no action for the present on the Report of the Monopolies Commission. Governmental decisions would not be made on matters which were justiciable under the Restrictive Trade Practices Bill (see above) (550 H.C. Deb., 1955, March 27, 1956). This decision as to justiciable matters also applies to the Report on Sand and Gravel in Central Scotland (see last note above) (*ibid.*, 154–156, March 23, 1956).

### Trade Unions

*Investigation.* The Minister of Labour and National Service stated that he would not set up a commission parallel to the Monopolies Commission to inquire into the restrictive practices of trade unions (548 H.C. Deb., *45*, January 26, 1956) nor introduce legislation under which the restrictive practices of trade unions could be referred to the Monopolies Commission (*ibid.*, 2520–2523, February 16, 1956).

## NATIONAL HEALTH SERVICE

### Cost

*Report of Committee.* In April, 1953, the Minister of Health and the Secretary of State for Scotland appointed a Committee (chairman, Mr. C. W. Guillebaud) with these terms of reference: To review the present and prospective cost of the National Health Service; to suggest means, whether by modifications in organisation or otherwise, of ensuring the most effective control and efficient use of such Exchequer funds as may be made available; to advise how, in view of the burdens on the Exchequer, a rising charge upon it can be avoided, while providing for the maintenance of an adequate service; and to make recommendations.

The Report of this Committee into the cost of the National Health Service was published on January 25, 1956 (Cmd. 9663). The Minister of Health stated that the Committee's main conclusion was that it would be premature at this point of time to make any fundamental alteration in the structure of the service; that the Committee specifically indicated their support by and large of the main administrative features of the various services; that with the Committee's general conclusion and approach on these matters the Government were in agreement; that the Committee proposed that after 1957–1958, £30 million annually would be a desirable level of capital expenditure in the hospital service over the seven succeeding years, and that, when financial circumstances permit, the existing Exchequer grant towards the capital cost of providing residential accommodation for the aged should be replaced by a 50 per cent. grant on the net total expenditure of local authorities on such accommodation; that the Government could not undertake any additional financial commitments in respect of the Health Services at the present time; that the Committee found that any charge of widespread extravagance was not borne out by the Committee's evidence (548 H.C. Deb., 207–210, January 25, 1956).

### Medical Services

*Executive councils.* The Minister of Health stated that following discussions with representatives of the profession he proposed to amend the Regulations to make it clear that an executive council had power to make any arrangements necessary to continue general medical services to patients, including the provision of a deputy for a doctor taken ill (548 H.C. Deb., *218*, February 10, 1956).

## NATIONAL INSURANCE

### Appointment

*Deputy Commissioner.* Her Majesty the Queen has approved the appointment of Mr. G. Granville Slack, B.A., LL.M., Barrister-at-Law, to be a deputy Commissioner on a part-time basis, with effect from February 1, 1956.

### Benefits

*New Zealand.* A reciprocal agreement between the United Kingdom and New Zealand was signed on December 20, 1955, coming into operation on April 1, 1956. The Ministry of Pensions and National Insurance will treat people who come to the United Kingdom from New Zealand as if they had paid contributions to the National Insurance Scheme while they were in New Zealand so as to enable them to qualify for retirement pensions, widows' benefits and sickness and unemployment benefits. People going from United Kingdom to New Zealand will continue, as at present, to receive any retirement pension or widows' benefit for which they have qualified under the National Insurance Scheme. The New Zealand Ministry of Social Security will treat such persons as if they had been resident in New Zealand while they were living in the United Kingdom so as to enable them to satisfy the conditions for New Zealand benefits and will take into account the amount of any National

Insurance benefit to which they are entitled. The agreement also provides for the payment of sickness and unemployment benefit under the New Zealand schemes to people from this country (Cmd. 9682; S.I. 1956, No. 88; Commonwealth Survey, C.O.I., January 10, 1956, p. 16).

*Unemployment.* Under the National Insurance (Unemployment and Sickness Benefit) Regulations, 1948 (S.I. 1948, No. 1277) a day on which a person does no work and is on holiday cannot (with certain exceptions) be treated as a day of unemployment. New regulations have been made which add provisions applying in certain cases where a person is on holiday whilst engaged under a contract of service after having been on holiday, during a particular period, for a certain number of days. The new regulations provide, in relation to the persons affected, that where they are on holiday on certain days they shall be deemed not to be on holiday on those days (National Insurance (Unemployment and Sickness Benefit) Amendment Regulations, 1956 (S.I. 1956, No. 227); for Report of the National Insurance Advisory Committee see H.C. 202 of 1955–1956).

*Widows.* The National Insurance Advisory Committee (Chairman, Sir Will Spens) has issued a Report. The major changes proposed by the Committee are (1) the re-establishment in insurance of widows who cease to qualify for widows' benefits, (2) the continuance of widowed mother's allowance while the widow has a child under eighteen residing with her, instead of only up to Family Allowances age limits as at present, (3) the amounts paid for the children of widowed mothers to be increased " substantially," (4) no change in the general minimum age of fifty for widow's pension, but the present condition of ten years of marriage to be reduced to three years, (5) if the above changes are made, the present provision of a widow's pension for a woman ceasing to be entitled to a widowed mother's allowance between the age of forty and fifty to be discontinued (Cmd. 9684).

The changes would need an amending Act of Parliament. The Government have adopted the Committee's proposals in full but legislation will not be introduced this Session (549 H.C. Deb., 836–840, February 27, 1956).

### Contributions

*Arrears.* Where a person is convicted of failing to pay a National Insurance contribution contrary to section 2 (6) of the National Insurance Act, 1946, and failure to pay contributions during the preceding two years is proved, the justices must make an order for that person to repay to the fund under regulation 19 of the National Insurance (Contribution) Regulations, 1948, a sum equal to the amount of the arrears.

An information was preferred against the defendant, charging him with failing to pay a contribution in respect of the week commencing May 16, 1955, which he was liable to pay under the National Insurance Act, 1946, as a self-employed person, contrary to section 2 (6). At the hearing of the information the defendant pleaded guilty to the offence and was duly convicted. A summons had been issued in respect of the information and duly served on the defendant together with a notice dated August 16, 1955, under regulation 19 of the National Insurance (Contributions) Regulations, 1948, to the effect that in the event of the defendant being convicted, it was intended to give evidence of his failure to pay other contributions amounting to £17 8s. 7d. The defendant had not paid 7s. 5d. in respect of his contribution as a self-employed person for the week commencing May 16, 1955, and he was liable to pay that sum to the National Insurance Fund; nor had he paid £17 8s. 7d. in respect of the arrears and he was liable also to pay that sum to the fund. The justices were of the opinion that they had no jurisdiction to make the orders. *Held*, on appeal, the justices came to a wrong decision, and the case must go back telling them that it was their duty to make an order that the defendant should pay the contributions which it had been proved he had failed to pay, by such instalments as the justices might order: SHILVOCK *v.* BOOTH [1956] 1 W.L.R. 135; [1956] 1 All E.R. 382, D.C.

*Exemption.* Section 5 (1) of the National Insurance Act, 1946, provides: "... Regulations may provide for (*a*) excepting insured persons from liability to pay contributions for periods— ... (iii) when they are not in receipt ... of income exceeding £104 a year ..." "Income" in section 5 (1) (*a*) (iii) of the National Insurance Act, 1946, means that which comes in, and it is immaterial that a person who has more than £104 coming in shows consistent net losses which are accepted by the Commissioners of Inland Revenue for income tax purposes.

The appellant appealed from a decision of the Minister of Pensions and National Insurance that he was not entitled to exemption from payment of National Insurance contributions under section 5 (1) of the National Insurance Act, 1946, and regulations made thereunder. The appellant's gross income exceeded £104 a year, but by reason of his ploughing his profits back into his business his annual accounts showed persistent net losses and were accepted for income tax purposes. *Held*, the Minister had correctly construed the provisions of section 5 (1) of the National Insurance Act, 1946, and the appellant, being in receipt of a gross income exceeding £104 a year, was liable to pay insurance contributions: LONGSDON *v.* MINISTER OF PENSIONS AND NATIONAL INSURANCE [1956] 2 W.L.R. 176; [1956] 1 All E.R. 83, Havers J.

*Research students.* Post-graduate research students have in some cases been classified as self-employed. The Joint Parliamentary Secretary to the Ministry of Pensions and National Insurance stated that the Minister was examining the general position (549 H.C. Deb., 2082–2092, March 6, 1956).

**Decisions of the Commissioner**

*Compensation.* Under the National Insurance (Unemployment and Sickness Benefit) Regulations, 1948 (S.I. 1948, No. 1277, as amended by S.I. 1954, No. 117), regulation 6 (1) (*d*), unemployment benefit is not payable to a claimant who is in receipt of "compensation for the loss of the remuneration which he would have received if his employment had not been terminated."

The claimant was employed for a period of five years from May 1, 1952, at a salary of £1,600 per annum. His employment was terminated in 1954 in breach of the agreement. He received his salary to July 31, 1954, and was paid £4,400 under a further agreement which released his employers from all claims. The claimant's contributions to a pension fund were repaid to him, and he received the contributions made by his employers to that fund in respect of him. *Held,* that the sum of £4,400 which represented the amount of salary lost upon breach of the original contract was compensation for the claimant's loss of his contractual salary and he could not be treated as unemployed on any day between August 1, 1954, and April 30, 1957: Decision No. R(U) 29/55.

*Guaranteed week.* The effect—in relation to title to unemployment benefit—of a guaranteed minimum wage agreement has been repeatedly considered both by the Umpire under the old Unemployment Insurance Acts and by the present Commissioner. The principle is (see Umpire's decision No. 215/47 and Commissioner's decision C.U. 137/49): "Where a minimum wage is paid in respect of any week in which work is done it has always been held that the recipient of that wage is not unemployed during that week, on the ground that the wage is a payment made in respect of each and all the days of the week, and is a payment for the whole week."

The employment of the claimant, a plasterer, who normally worked a six-day week was regulated by a guaranteed wage agreement including a provision for payment of the full guaranteed minimum equivalent to thirty-two times the hourly wage rate in the event of his being discharged by the tendering of two hours' notice expiring at the normal finishing time on a Friday. The normal working week was from Monday to Saturday inclusive, totalling forty-four hours. On this occasion the claimant worked forty hours and was paid for forty hours' work. He was given the two hours' notice as above and it was understood on both sides (a) that he need not present himself again for work until weather conditions improved; (b) that he was at liberty to seek work with another employer; and (c) that he would be welcomed back when work again became available if he was available to take it. The claimant claimed for unemployment benefit for the Saturday. In Commissioner's decision R(U) 13/51 he said that a provision which provided that there should be no reduction in the guaranteed minimum if the operative is discharged on a Friday " affords no logical grounds for the inference that in the event of such discharge a proportion of the minimum is paid in respect of a day on which the claimant is not in the employer's employment." *Held*, that these words covered the present case; that the claimant was discharged in the sense of the guaranteed wage agreement; that he was not to be regarded as continuing to receive wages for the Saturday; and that he was therefore entitled to unemployment benefit in respect of the Saturday: Decision No. R(U) 25/55.

*Husband and wife residing together.* Under the National Insurance Act, 1946, s. 24, the weekly rate of sickness benefit is increased for any period during which the beneficiary is residing with his wife, subject to certain exceptions. By section 78 (3) " two persons shall not be deemed to have ceased to reside together by reason of any temporary absence of either or both of them, and in particular by reason of any *such* absence . . . while receiving medical treatment as an in-patient in a hospital."

The claimant in receipt of sickness benefit had received an increase in respect of his wife for a period of about three years during which she had been a voluntary patient of a mental hospital. During this period she had been home on forty-three occasions, the visits home being distributed throughout the period and amounting in the aggregate to about one-third of the period. There was evidence that her discharge was unlikely to be advisable within six months. *Held*, after a review of previous Commissioner's decisions relating to comparable circumstances, that the wife's absence from home had not ceased to be temporary, and therefore that she and the claimant continued to reside together and that he was entitled to the increase: Decision No. R(S) 14/55.

*Misconduct causing loss of employment.* Under the National Insurance Act, 1946, s. 13 (2) (*a*) a person is disqualified for receiving unemployment benefit for a certain period if he has lost his employment through his misconduct.

The claimant's employment was terminated by his employers on grounds of discipline after he had brought an unsuccessful charge against his supervisor for assault. *Held*, that misconduct within the meaning of section 13 (2) (*a*) had not been proved since there was no evidence that the claimant knew the charge to be false or had made it recklessly: Decision No. R(U) 24/55.

*Overlapping benefit.* Under the National Insurance (Overlapping Benefits) Regulations, 1948 (S.I. 1948, No. 2711, as amended by S.I. 1952, Nos. 422 and 526) it is provided that " where for any period any dependency benefit under the Act is or, but for this regulation, would be payable to any person in respect of . . . an adult dependant, that dependency benefit shall be adjusted . . . (*b*) . . . by reference to any other dependency benefit " specified in paragraph (2) of that regulation " which is payable for that period to that person in respect of that . . . adult dependant or to any person in respect of that adult dependant."

The claimant was entitled to sickness benefit, together with an increase in the rate of benefit in respect of his wife. The claimant was in receipt of a war disability pension of 12s. 4d. a week under a Royal Warrant. He was also awarded under that Warrant a sum of 2s. a week in respect of his wife and this sum was paid direct to his wife but the terms of the Warrant made it clear that the award was to the claimant and not to the wife. Under the Overlapping Benefits Regulations, the sum of 2s. was deducted from the increase paid to the claimant. *Held*, that the 2s. was a dependency benefit " payable " to the claimant and that the deduction had been rightly made: Decision No. R(S) 13/55.

*Reasonable opportunity of suitable employment.* Under the National Insurance Act, 1946, s. 13 (2) (*c*) a person is disqualified for receiving unemployment benefit for a certain period if he has neglected to avail himself of a reasonable opportunity of suitable employment.

The claimant presented himself in a dirty and unshaven state for an interview with a prospective employer, with a view to a situation as a parcel porter. As a result he was not engaged. *Held*, that he incurred disqualification: Decision No. R(U) 28/55.

*Registration for employment.* Under the National Insurance (Seasonal Workers) Regulations, 1950 (S.I. 1950, No. 1220, as amended by S.I. 1952, No. 1466), reg. 2 (1) (*a*) a claimant who has been a seasonal worker for at least two years prior to the day for which unemployment benefit is claimed must have been registered for employment at an employment exchange throughout the period of two years immediately preceding that day, " any inconsiderable period " being disregarded.

The claimant was normally employed as deckhand on a fishing vessel. On March 25, 1955, he lodged a claim for unemployment benefit. He had failed to register from September 11, 1954, to October 2, 1954. *Held*, that this period of twenty-two days (nineteen working days) could not be regarded as inconsiderable and the claim for unemployment benefit was disallowed: Decision No. R(U) 26/55.

*Repayment in good faith.* Under the National Insurance (Hospital In-Patients) Regulations, 1949 (S.I. 1949, No. 1461 as amended by S.I. 1952, No. 2179), the rate of retirement pension is reduced where a claimant is in receipt of free in-patient treatment. Under the National Insurance (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948, No. 1144) any benefit overpaid must be repaid to the National Insurance Fund unless " the person concerned is shown to the satisfaction of . . . the Commissioner . . . to have acted in good faith in all respects as to the obtaining and receipt of the benefit."

A retirement pensioner was in hospital for over a year and was incapable of acting for himself. These facts were not communicated to the Ministry until after his discharge. With the pensioner's apparent approval, his son acted as his agent, although not then appointed by the Minister so to act, and drew the pension in full, incurring an overpayment. *Held*, that the actions of the son in obtaining benefit must be treated as done by the pensioner, and that, as he had not satisfied the determining authorities that he had acted in good faith in all respects, the pensioner was required to repay the sum overpaid. Decision No. C.W.G. 6/50 compared: Decision No. R(P) 1/56. See also Decision No. R(G) 11/55 below.

*Retirement—continuing to work.* Under the National Insurance Act, 1946, s. 20, a person is entitled to retirement pension if he is over pensionable age and has retired from regular employment. He may be treated as having so retired notwithstanding that he is engaged in gainful occupation if he is engaged " only occasionally or to an inconsiderable extent or otherwise in circumstances not inconsistent with retirement."

(1) The claimant had for sixteen years prior to attaining pensionable age worked solely on his 25-acre holding which provided his only means of livelihood, and was at the date of his notice of retirement still doing so. *Held*, that the claimant could not be treated as having retired from regular employment: Decision No. R(P) 15/55.

(2) The claimant, a shop assistant, gave notice of retirement, stating that she intended to continue in the same employment for two days a week, Fridays and Saturdays, working eight hours each day for a wage of £1 13s. 6d. a week. *Held*, that this work was not inconsistent with retirement and that the claimant could be treated as having retired: Decision No. R(P) 16/55.

*Retirement—notice of retirement.* Under the National Insurance Act, 1946, s. 20 (1) (*a*) (*b*) and the National Insurance (Claims and Payments) Regulations, 1948 (S.I. 1948, No. 1041) Sched. II, Part II, para. 8, now to be found set out in the National Insurance (Claims and Payments) Amendment Regulations, 1952 (S.I. 1952, No. 1207), Sched. A, notice in writing of retirement must be given to the Minister before a right to retirement pension can arise. Under the National Insurance and Industrial Injuries (Reciprocal Agreement with France) Order, 1949 (S.I. 1949, No. 2011), Sched. II, Part III, article 19, " the competent authorities of the two contracting Governments and the social security authorities shall furnish mutual assistance in the same degree as if the matter in question were one affecting the application of their own social security schemes."

A British subject resident in France did not give written notice of retirement to the Ministry of Pensions and National Insurance in Great Britain until more than six months after his sixty-fifth birthday but he had before that date completed a form of application to the Sécurité Sociale in Paris for an old-age pension. *Held*, that the claimant could be treated as having given notice of retirement on the date of completion of the application to the Sécurité Sociale; the form could be construed as written notice of retirement and the Sécurité Sociale could be regarded as agents of the Minister of Pensions and National Insurance for the purpose of receiving such notice (Decision No. R(P) 14/55).

*Trade dispute.* Under the National Insurance Act, 1946, s. 13 (1) a person who has lost employment by reason of a stoppage of work which was due to a trade dispute is disqualified for receiving unemployment benefit unless he proves (*b*) that he does not belong to a grade or class of workers of which, immediately before the stoppage, there were members employed at his place of employment any of whom are participating in or financing or directly interested in the dispute.

At the time of a stoppage of work due to a trade dispute at the claimant's place of employment, there was a substantial increase of absenteeism amongst the grade or class of workers to which the claimant belonged. It was contended for the claimant, but not proved by evidence, that this increase was due to sickness. *Held*, that the claimant had not discharged the onus of proof on him under section 13 (1) (*b*) and that he was disqualified for receiving unemployment benefit (Decision No. R(U) 27/55).

*Widow's cohabitation.* Under the National Insurance Act, 1946, s. 17 (2) a widow's pension is not payable for any period during which she is cohabiting with a man as his wife. Under the National Insurance (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948, No. 1144), benefit overpaid must be repaid unless the person overpaid acted in good faith in all respects as to the obtaining and receipt of benefit (see Decision No. R(P) 1/56 above).

A married man with whom the claimant had lived for a time during her husband's lifetime finally left his wife and went to reside with the claimant a few months after her husband's death. He and the claimant wished to marry. Together with her two daughters they lived at first in a four-roomed house, later moving to a two-roomed house, the man being ostensibly a lodger. *Held*, that the claimant was cohabiting with the man as his wife; judging from the situation in which they were living it was natural to infer that they were cohabiting in the sense of the statute and impossible to accept the contrary; that there was no evidence on which it could be found that the claimant was acting in good faith since she based her case on no co-habitation; and that she must repay the sum of £506 9s. 6d. (Decision No. R(G) 11/55).

## National Insurance (Industrial Injuries)

### Benefits

*Byssinosis.* The Industrial Injuries Advisory Council (Chairman: Sir Arnold Plant) have reported on the provision made for byssinosis under the National Insurance (Industrial Injuries) Act, 1946. The Council recommend (1) That disablement pension for byssinosis should no longer be subject to any special limitation as to degree of disablement; under section 57 (2) of the Act and the Prescribed Diseases Regulations (S.I. 1948, Nos. 1371 and 2723) the degree of disablement is 50 per cent. (2) That the present condition relating to length of employment should be modified to require a minimum of ten years' employment in a prescribed occupation instead of twenty years as at present (Cmd. 9673).

These recommendations were adopted by the National Insurance (Industrial Injuries) (Prescribed Diseases) Amendment Regulations, 1956 (S.I. 1956, No. 118).

*Cadmium poisoning.* The Industrial Injuries Advisory Council have also reported on the question whether cadmium poisoning should be prescribed under section 55 of the Act. The Council recommend that " Poisoning by cadmium " should be prescribed and that insurance against this disease should be provided under the Act for all persons whose occupations involve exposure to cadmium fumes (Cmd. 9674).

This recommendation was adopted by the National Insurance (Industrial Injuries) (Prescribed Diseases) Amendment Regulations, 1956 (S.I. 1956, No. 118).

### Decisions of the Commissioner

*Coronary disease.* Under the National Insurance (Industrial Injuries) Act, 1946, s. 7 (1), where an insured person suffers personal injury caused by accident arising out of and in the course of his employment then (*c*) industrial death benefit shall be payable to certain persons if the death of the insured person results from that injury.

A workman collapsed and died whilst loading cathodes of copper each weighing 56–59 lb. in the hold of a ship. This was the sort of work to which he was accustomed and he had been doing it without a break for some three hours. The cause of death was coronary occlusion by atheroma. *Held*, that the effort involved in this work in the case of a man accustomed to it would not have any effect in increasing the demand for blood supply beyond the level at which the arteries could maintain it. The deceased might have died at any time and the fact that he died whilst working was mere coincidence; that therefore death was not due to an industrial accident and the claimant widow was not entitled to industrial death benefit (Decision No. R(I) 34/55).

*Day of incapacity.* Under the National Insurance (Industrial Injuries) Act, 1946, s. 11 (1), an insured person is entitled to injury benefit in respect of any day on which, as the result of the relevant injury, he is incapable of work during the injury benefit period. Under the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948 (S.I. 1948, No. 1372, as amended by S.I. 1953, No. 1314), reg. 25B, in the case of night workers, where a period of employment begun on any day other than Saturday or Sunday extends over midnight into the following day, the person employed shall, in respect of such period, be treated as having been employed on the second day only, if the employment after midnight is of longer duration than that before midnight, and the second day shall not be treated as a day of incapacity for work.

The claimant became incapable of work following the completion of a shift from 10 p.m. on a Monday to 5.45 a.m. on a Tuesday and contended that reg. 25B should not be applied to him, and that the Tuesday should be treated as a day of incapacity for work, because he was not a regular night worker. *Held*, that the regulation applied to the claimant, irrespective of his conditions of work at other times (Decision No. R(I) 31/55).

*Hardship allowance.* Under the National Insurance (Industrial Injuries) Act, 1946, s. 14, as amended by the National Insurance (Industrial Injuries) Act, 1948, " (1) The weekly rate of a disablement pension shall, subject to the following provisions of this section, be increased by an amount not exceeding " a named sum, " if as the result of the relevant loss of faculty the beneficiary (*a*) is incapable and likely to remain permanently incapable of following his regular occupation; and (*b*) is incapable of following employment of an equivalent standard which is suitable to his case. (4) The amount of the increase shall be determined by reference to the beneficiary's probable standard of remuneration during the period for which it is granted in the insurable employments (if any) which are suitable in his case and which he is likely to be capable of following as compared with that in his regular occupation (within the meaning of subsection (1) of this section)."

Following an industrial accident, a coal hewer returned to work as a salvage worker until he became totally incapacitated by reason of a condition unconnected with the accident. For a period whilst he was so incapable, the probable earnings as a salvage worker either exceeded the probable earnings as a hewer or fell short by only one shilling and twopence. *Held,* that although the claimant was incapable of working as a salvage worker, his probable earnings from that occupation should be taken into account for the purposes of section 14 (4). That subsection should be interpreted as having regard only to the effects of the relevant loss of faculty (*i.e.,* the injury resulting from the industrial accident), and the fact that the claimant became incapacitated for the suitable employment through some unconnected condition should be disregarded (Decision No. R(I) 33/55).

*Incapable of following regular occupation.* For the statutory provision (s. 14 (1) ), see R(I) 33/55 above.

A miner sustained an industrial accident, but, because the true extent of his injury was not at first diagnosed, his doctor advised him to return to work, and he did so for nearly six months before being certified to be incapable of work. *Held,* that the insurance officer's decision that the claimant had not been continuously incapable of following his regular occupation, having been given in ignorance of the fact that the claimant's return to work was on medical advice for the purpose of rehabilitation, should be reviewed (Decision No. R(I) 35/55).

Following an industrial accident, a joiner who had previously been mainly employed on outside work was restricted to inside work where there were fewer opportunities for overtime. *Held,* that the claimant was incapable of following his regular occupation and of following suitable employment of an equivalent standard. A joiner who was restricted to inside work could not be said to fulfil the ordinary requirements of employers (Decision No. R(I) 39/55).

*Out of and in the course of employment.* Under the National Insurance (Industrial Injuries) Act, 1946, s. 7, benefit is payable where an insured person suffers personal injury caused by accident arising out of and in the course of his employment.

A factory storekeeper stood on a chair to investigate a draught at his place of work, and caught his hand in the blades of a fan which was part of the heating system. The factory had a specialised maintenance staff to make regular inspections and to regulate temperatures, and it was the practice to report any complaints to the maintenance staff. *Held,* that the accident did not arise out of and in the course of the claimant's employment (Decision No. R(I) 32/55).

A Post Office technician was injured when putting up Christmas decorations in one of the offices. He had been asked to do this by his immediate superior officer but the request was not made on behalf of his employers and the superior officer had no authority to make such a request. While the employers did not object to the office being decorated they issued no instructions in the matter. *Held,* that the work was not done in the course of employment (Decision No. R(I) 36/55).

A member of a furniture removal team was fatally injured in an accident to the van in which he was travelling after the day's work had been completed. The team had diverged from the direct route back to the depot where they were supposed to clock off; first, for the purpose of visiting a public-house and then in order to drop the deceased at a point near his home. *Held,* that at the time of the accident, the deceased was doing nothing incidental to the performance of his duty to his employers, nor was he within the scope of section 9 (accidents happening while travelling in employer's transport) of the National Insurance (Industrial Injuries) Act, 1946.

*Prescribed disease.* Under the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948 (S.I. 1948 No. 1371, as amended by S.I. 1951 No. 305) tuberculosis is prescribed disease 38. For a particular claimant to show, under these Regulations, that the disease is prescribed in relation to himself, he must show that he has been on or after July 5, 1948, employed in "an occupation involving close and frequent contact with a source or sources of tuberculous infection by reason of employment" in certain named types of employment.

A mortuary superintendent became incapable of work by reason of tuberculosis. His duties over a period of twelve years involved assisting a pathologist at post-mortem examinations. During the last two years out of 606 bodies examined 13 cases occurred in which tuberculosis was included in the cause of death. *Held,* that the claimant was not in "frequent contact" with a source or sources of tuberculous infection (Decision No. R(I) 38/55).

*Relative residing with claimant.* Under the National Insurance (Industrial Injuries) Act, 1946, s. 18 (1) (*c*), the weekly rate of injury benefit is increased for any period during which "the beneficiary has residing with him and is wholly or mainly maintaining any such other relative as may be prescribed." Under the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948 (S.I. 1948 No. 1372) reg. 8 (1) and Sched. IV a mother is included amongst prescribed relatives. Section 88 (4) (*b*) of the Act provides that "two persons shall not be deemed to have ceased to reside together by reason of any temporary absence of either or both of them, and in particular by reason of any such absence at school or while receiving medical treatment as an in-patient in a hospital or similar institution."

The claimant, an Italian, who had lived with his mother in Italy, came to work in England in 1951 and had been home for a holiday on one occasion since. It was uncertain whether or when he would return to Italy. In four years he had sent home over £500. *Held,* that the claimant's mother in Italy could not be treated as residing with him; the interruption of their residence together could not be regarded as temporary (Decision No. R(I) 37/55).

## NATIONALISED INDUSTRIES

### General

*Accountability.* The Lord Privy Seal stated that the Prime Minister was aware of the desire of Members of Parliament to have full information about the nationalised industries; and that how this might best be achieved was now under fresh consideration by the Government, following the recent Report of the Select Committee on Nationalised Industries (548 H.C. Deb. 760, January 31, 1956). And see below, **Airways,** *Members.*

*Appointment.* A list has been issued of members of public boards of a commercial character as at November 1, 1955. The boards covered are the Airways Corporations, the Atomic Energy Authority, Cable & Wireless Ltd., the National Coal Board, the Colonial Development Corporation, the Electricity Authority and Boards, the Gas Council and Boards, the Iron and Steel Holding and Realisation Agency, the Road Haulage Disposal Board, the British Transport Commission and the London Transport Executive. The list gives the names of the members, their salaries, allowances and tenure of office (Cmd. 9660).

*Ministers' powers.* The Minister of Transport and Civil Aviation, answering a question which asked him to give general directions to the British Transport Commission and the Air Corporations instructing them to undertake not to raise their prices for a fixed period, stated that he did not think it would be desirable or practicable to bind these bodies in that way (548 H.C. Deb. *192*, January 25, 1956). The Minister of Fuel and Power, answering similar questions, gave a similar answer and added that his power to give directions on prices was open to great legal doubt (*ibid.* 1333–1336, February 6, 1956).

The Minister of Fuel and Power refused to give a general direction to the coal, electricity and gas corporations to advertise publicly for tenders for all work they let out to contractors. He stated that this was a matter of day-to-day administration in which he considered it quite wrong for him to intervene unless there was very grave cause (*ibid.* 1336).

**Airways**

*Grants.* The Minister of Transport and Civil Aviation stated that he saw no immediate reason which would necessitate the extension of the Exchequer grant provisions of the Air Corporations Act, 1949, when they expired on March 31, 1956, and that he was delighted to see that the air corporations could stand on their own feet (548 H.C. Deb. 1672, February 8, 1956).

*Guarantees.* The Treasury issued statements of guarantees on loans proposed to be raised by the British European Airways Corporation (H.C. 156 of 1955–1956) and the British Overseas Airways Corporation (H.C. 168 of 1955–1956) and on stock issued by the British Overseas Airways Corporations (H.C. 163 of 1955–1956).

*Members.* Sir Miles Thomas indicated his intention to resign from the chairmanship of the British Overseas Airways Corporation (for references to " back-bench sniping," see 550 H.C. Deb. 2145–2146, March 28, 1956).

**Coal**

*Administration.* The Minister of Fuel and Power stated that the reconstitution of the National Coal Board on the lines suggested by the Fleck Committee had been completed and that the Government were considering the recommendations of the Committee about salaries of Board members (549 H.C. Deb. 6–7, February 20, 1956).

**Electricity**

*Committee's Report.* The Report of the Committee (Chairman: Sir Edwin Herbert) appointed " to inquire into the organisation and efficiency of the electricity supply industry in England and Wales in the light of its working under the Electricity Act, 1947, and to make recommendations " was published on January 31, 1956 (Cmd. 9672). The Minister of Fuel and Power stated that the Report, which was unanimous, was the first independent review of a whole nationalised industry by a body appointed by the Government. It recommended a number of changes in the organisation of the industry, some of which, if approved, would require legislation (548 H.C. Deb. *69–70*, January 30, 1956). The Committee summarised its main Conclusions and Recommendations in 125 paragraphs, which include the proposals that a new statutory corporation should be established to take over from the Central Authority the responsibility for generation, and that the Central Authority should comprise three full-time and four part-time members and not include members of the Area and Generation Boards.

The Minister also stated that he had asked the Central Authority and each Board to let him have by the end of February, 1956, their views on the recommendations in the Report dealing with the statutory structure of the industry and certain other matters of national policy and later to supplement those views with observations on other aspects of the Report (*ibid.* 2070, February 13, 1956). He also stated that the Government were considering the recommendations in the Report about the salaries of Board members (549 H.C. Deb. 6–7, February 20, 1956).

The Joint Under-Secretary of State for Scotland stated that the Secretary of State did not think that it would be reasonable to hold an inquiry similar to that of the Herbert Committee into the organisation of the Scottish Electricity Boards as the reorganisation of the electricity supply industry took effect only on April 1, 1955 (550 H.C. Deb. 199, March 13, 1956).

*Guarantees.* The Treasury issued statements of guarantees on loans proposed to be raised by the Central Electricity Authority (H.C. 174 and 205 of 1955–1956), by the North of Scotland Hydro-Electric Board (H.C. 160 of 1955–1956) and by the South of Scotland Electricity Board (H.C. 161 of 1955–1956).

*Ministers' powers.* The Minister of Fuel and Power refused to issue a general direction to the Central Electricity Authority to consult local electricity boards before conceding wage claims. He stated that he had seen the correspondence in *The Times* in which the Chairman of the London Electricity Board alleged that local electricity boards were not consulted; that he had asked that Chairman whether or not he thought there was some defect in the existing wage negotiation machinery and that the Chairman had conveyed to him that in his view there was no defect. The Minister stated that he had indicated to the Chairman his severest displeasure that he should have in the first instance indicated his views in the correspondence columns of *The Times* rather than directly to the Minister. The Minister stated that he could not but deprecate that differences of views between two appointees of his [the Chairmen of the Central Authority and the London Electricity Board] should have been ventilated in the Press rather than in other ways (549 H.C. Deb. 12–13, February 20, 1956).

The Minister of Fuel and Power stated that he or his predecessors had exercised the powers to make regulations, relating to pensions for employees, on five occasions under the Gas Act, 1948, s. 58 (1), and on four occasions under the Electricity Act, 1947, s. 54 (1). The details were given in the Official Report (549 H.C. Deb. 10–12, February 20, 1956).

*Reports.* The Annual Report and Statement of Accounts for 1955 of the North of Scotland Hydro-Electric Board and the Report of the Electricity Consultative Council for the North of Scotland District have been published (H.C. 193 of 1955–1956).

The first Report and Statement of Accounts (for the period April 1 to December 31, 1955) of the South of Scotland Electricity Board and the Report of the Electricity Consultative Council for the South of Scotland District have also been published (H.C. 223 of 1955–1956).

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS (p. 144, above).

### Gas

*Guarantee.* The Treasury issued statements of guarantees on loans proposed to be raised by the Gas Council (H.C. 159 and 233 of 1955–1956).

*Ministers' powers.* The Minister of Fuel and Power refused to give a general direction to gas boards not to participate with private firms in price-fixing agreements (548 H.C. Deb. *290,* February 16, 1956).

For the exercise of Minister's power to make regulations relating to pensions, see above, this page.

### Transport

*Canals and inland waterways.* The Minister of Transport and Civil Aviation has appointed a Committee of inquiry (Chairman: Mr. Leslie Bowes, C.B.E.) to consider and report on the future of the country's system of inland waterways and to make proposals in regard to certain specified matters; and to consider the present law relating to the closing of waterways to navigation and to make recommendations (548 H.C. Deb. 920–923, February 1, 1956). No time limit has been set for the deliberations of this Committee but the inquiry is regarded by the Ministry and the members of the Committee as a matter of urgency (*ibid.* 1668, February 8, 1956). The Minister refused to broaden the terms of reference so that the Committee might examine proposals for a new waterways system, on the ground that this was not a practical proposition in the foreseeable future (*ibid. 174*).

*Charges.* The Transport Tribunal has been hearing the application by the British Transport Commission to confirm the British Transport Commission (Railway Merchandise) Charges Scheme (see p. 174, below).

The Minister of Transport and Civil Aviation stated that after consultation with the Chairman of the Commission it has been decided (a) to defer increases in certain fares on London Transport services and British Railways for which the Commission has applied to the Transport Tribunal under the Transport Act, 1953, s. 23; (b) with regard to railway freight, dock and canal charges in respect of which the Commission has made an application to the Minister under the Transport Act, 1947, s. 82, the Minister considered it expedient that regulations should be made to make increases in general not exceeding 5 per cent.; (c) as regards those increases in passenger fares for which the Commission has an existing authority from the Tribunal, the Commission will make its own announcement. These changes will increase the Commission's revenue by some £20 million in a full year. The position must be re-assessed in six months' time. Within this period the Commission would come forward with proposals—for example, these might include much more drastic closure of branch lines and many more drastic economies that would be necessary (550 H.C. Deb. 829–834, March 19, 1956; for answer to further questions, see 550 H.C. Deb. 2132–2135, March 28, 1956).

*Powers.* The British Transport Commission Act, 1955 (4 Eliz. 2, c. xxx) provides in Part II that the Commission may undertake certain works including the construction of railings, in the counties of London, Middlesex, Essex and Nottingham and in the County Borough of East Ham, with power to open the surface of streets. Power is also given to stop up and discontinue certain footpaths, level crossings and roads. Part III of the Act concerns inland waterways and provides that all rights of navigation on parts of the Ripon, Lancaster, Ashton, Birmingham, Staffordshire and Worcestershire, and Dudley canals shall cease and be extinguished and that the Commission shall cease to be under any obligation to keep these waterways open or maintain them. Part IV of the Act empowers the Commission to acquire certain lands. Owners of certain property of which only part is sought to be acquired may give notice to the Commission alleging that that part cannot be severed without material detriment. The Lands Tribunal has jurisdiction to determine whether this allegation is valid. Part V contains a number of protective provisions.

## NORTHERN IRELAND

### Elections

*Invalidity.* See above, p. 141.

## PARLIAMENT

### Constituencies

*Boundary Commission.* The Commission has issued its recommendations with respect to the following constituencies: Nottingham Central, North, South and West; Colchester; Maldon; Saffron Walden; Blackpool North; North Fylde; Eccles; Farnworth; Kingston-upon-Hull East; Bridlington; Bradford North; Shipley (H.C. 227 of 1955–1956).

**Pending Legislation**

*Judicial consideration.* It is the duty of the court to see that litigants have their cases tried, as they are entitled to, and the court cannot take into account the possible effect of a Bill before Parliament which, if passed into law in its existing form, may have some effect upon the rights of the parties.

The defendants took out a summons asking that all further proceedings in the action brought against them by the plaintiffs arising out of the defendants' failure to keep the Kennet and Avon canal in a navigable state of repair be stayed until the Commission's Bill, entitled British Transport Commission (No. 2), received the royal assent, except for the purpose of the plaintiffs obtaining an order for an inquiry as to damages. The defendants admitted that they had not complied and were not complying with their statutory obligations, but they alleged that the effect of the Bill would be to relieve them of their statutory obligations. *Held,* there was a preliminary objection which was fatal to the application. It was the duty of the court to see that litigants had their cases tried as they were entitled to do, and the court could not take into account the possible effect of some Bill now before Parliament, which, if passed, might affect the rights of the parties; therefore the summons must be dismissed: WILLOW WREN CANAL CARRYING CO. *v.* BRITISH TRANSPORT COMMISSION [1956] 1 W.L.R. 213; [1956] 1 All E.R. 567, Upjohn J. (applying *Att.-Gen.* v. *Racecourse Betting Control* [1935] Ch. 34; and *British and Colonial Furniture Co.* v. *William McIlroy* (1951) 1 C.L.C. 5475).

**Powers of the House of Lords**

*Attendance of Members.* The Report of the Select Committee on the Powers of the House in relation to the Attendance of its Members has been published together with the Proceedings of the Committee and Minutes of Evidence.

The Committee expressed the following opinions, *inter alia*: There can be no question that the House has the power to punish contempt by imprisonment or fine; and the fact that the House has not exercised that power for many years does not preclude the possibility of its future use (para. 8). The Writ of Summons in solemn terms imposes the duty of attendance in Parliament (para. 11). There is no question but that a Peer has a right to receive his Writ (para. 12). Under the Writ and the Patent a Peer has (a) the right to a " seat, place and voice " in Parliament; (b) the duty to attend in Parliament, and " treat and give his counsel "; (c) any other right which his Peers customarily possess (para. 14). Since 1841, no attempt has been made by the House to enforce the attendance of Peers, but there can be no doubt that such a power does still exist, and could be used by the House if it so wished (para. 18). The number of Temporal Peers was 150 in 1800, 498 in 1885 and 846 in 1955 (para. 19). Various expedients were considered to exclude, wholly or partially, Peers who habitually did not attend but, in the view of the Committee, these would not be within the power of the House to enforce (para. 21). The Committee have been unable to discover any instance in which Peers have been punished for failure to attend unless they have previously been specially summoned by order of the House; and in this latter case it seemed to the Committee that the contempt has lain in the disobedience to the order of the House rather than in the failure to attend (para. 23). Evidence placed before the Committee leads to the conclusion that the House could legitimately exercise a limited power of disqualification, but only if in so doing it followed the general law, and applied to members of the House an existing legal disqualification (para. 26). It would not be legitimate for the House, under the guise of granting leave of absence to a Peer, in effect to deprive him of his right to sit, speak and vote (para. 29). Neither the power of the House to enforce attendance nor its right to excuse Peers from attending has lapsed through desuetude; a Peer who at the present time is unable or unwilling to discharge his duty of attendance can reasonably be said to have a duty to apply to the House for leave of absence (para. 31). New Standing Orders could provide that a Peer was regarded as having applied for leave of absence unless he attended to take the Oath within one month of the beginning of a Parliament (para. 33). The Committee could not advise the House that it would be within its powers to attach penalties involving exclusion from the House to any new Standing Order on the subject of leave of absence but they did not think that the absence of any penalty would make the Standing Orders ineffective (para. 39) (H.L. (7) (66—I) (67) ).

In the course of a subsequent debate the Lord President of the Council and Leader of the House of Lords stated that he would take up the matters in the Report as a question of urgency with the Lord Chancellor and the Leaders of the other Parties in the House and report provisional conclusions (196 H.L. Deb. 8–52, February 28, 1956).

**Procedure**

*Allusion to House of Lords debates.* Mr. Speaker stated that, strictly speaking, all reference to debates in another place during the current Session, other than official, Ministerial speeches made in that place, was out of order. Nevertheless, in debate the Chair had been allowed to use a certain discretion in permitting such reference in a paraphrased form and in proper language. At Question Time, however, the rule was much stricter. No reference, either verbatim or paraphrased, to debates or answers in either House of Parliament was in order. The power to question Ministers was a valuable privilege designed to secure information or action. If references were allowed to recent statements in either House, Questions would tend to become a continuation of debate and would make unfair inroads on the limited time set aside for Questions of other Members (550 H.C. Deb. 835–837, March 19, 1956).

**Public Accounts Committee (House of Commons)**

*Reports.* The Committee issued its First, Second and Third Reports. The First Report dealt with (a) Colonial Office (Over-estimating; Grants in Aid to Malta and Malaya; Construction of reservoir in Jamaica); (b) Ministry of Agriculture and Fisheries (Agricultural education: Farm institutes); (c) Ministry of Transport and Civil Aviation (Delay in completion of tenancy agreements; Control of expenditure on works services); (d) Ministry of Food (Annual Review, 1953: Variations in price schedule for pigs; Home-produced shell eggs); (e) Post Office (Telephone plant: Provision for depreciation). The Second Report dealt with virement between votes of Service Departments. The Third Report dealt with (a) Ministry of Education (Milk in Schools Scheme); (b) Ministry of Supply (Abortive development work); (c) Forestry Commission (Forestry Fund (Grant in Aid) Account); (d) National Health Service (Chemists' remuneration; Pharmaceutical supplies: prices of drugs; Arrangements to secure economy in prescribing; Hospital costs; Purchase of supplies by Hospitals; Losses by theft or fraud); (e) Service Departments Accounts (Store Accounts and Losses; Overhaul of equipment by Ministry of Supply) (H.C. 15–I, 22–I, 124–I of 1955–1956). See also Special Report (H.C. 238 of 1955–1956).

See also ELECTIONS (p. 141, above), SUBORDINATE LEGISLATION (p. 171, below).

## PRACTICE

**Crown Practice**

*Cross-examination of deponent.* The court has power to allow cross-examination on affidavits in Crown proceedings, but the court will only exercise that power in an exceptional case.

B. applied for an order of certiorari to quash an order made by the justices in 1947, whereby he was adjudged the putative father of a bastard child and ordered to pay maintenance. B. applied on the ground that no summons was served on him to appear before the justices and that he knew nothing about the order until a summons was served on him in 1955 on complaint that the payments directed under the order had not been made. There was before the court, exhibited to the justices' affidavit, the original of the order made by the justices in 1947 in which the words indicating that the defendant had appeared were struck out. It subsequently appeared that those words had not been deleted when the order was drawn up. *Held,* in the very exceptional circumstances of the case the court would allow cross-examination of the deponents to the affidavits; it was probably the first case, certainly in recent history, where cross-examination had been allowed in Crown proceedings; after B. had been cross-examined and re-examined on his affidavit, the application was dismissed because it was quite clear that B. had been served with the summons. The acting clerk to the justices by altering the order had been guilty of contempt of court and was ordered to pay the extra expenses: R. *v.* STOKESLEY, YORKSHIRE, JUSTICES, *ex p.* BARTRAM [1956] 1 W.L.R. 254; [1956] 1 All E.R. 563, D.C. (applying *R.* v. *Kent Justices, ex p. Smith* [1928] W.N. 137).

*Privilege.* In an action for declaration that certain determinations of the Central Land Board under the Town and Country Planning (Scotland) Act, 1947, were *ultra vires* inasmuch as they were not in accordance with the provisions of the Act the Lord Ordinary allowed a proof before answer. Thereafter the pursuers and appellants moved the court to grant a diligence for the recovery of a number of documents in the hands of the defenders and respondents and of the Board of Inland Revenue. The defenders lodged a certificate under the hand of the Secretary of State for Scotland objecting to the production of certain of these documents on the ground that they belonged to a class which it was necessary for the proper functioning of the public service to withhold from production. The pursuers maintained that the Central Land Board was not entitled to claim the privilege on behalf of the Crown of withholding documents; and that there was an inherent power in the Scottish courts to overrule the certificate of the Minister and to order production of documents in his hands. The defenders contended that following upon a decision in *Duncan* v. *Cammell Laird & Co. Ltd.* [1942] A.C. 624 there was no longer an inherent power in the Scottish courts to override the certificate of a Minister. *Held,* dismissing the appeal, that the Central Land Board represented the Crown for the purpose of privilege in regard to the production of documents; (2) that the decision in *Duncan* v. *Cammell Laird & Co. Ltd.* (*supra*) did not alter the law of Scotland and that an inherent power remained in the Scottish courts to override the certificate of a Minister, but that (3) in the present case, the power ought not to be exercised: GLASGOW CORPORATION *v.* CENTRAL LAND BOARD 1956 S.L.T. 41, H.L. (affirming 1955 S.C. 64; 1955 S.L.T. 155). (This case is discussed on p. 6, above.)

## PUBLIC AUTHORITIES

### Powers

*Delegation.* Clause 16 (2) of the Dock Workers (Regulation of Employment) Order, 1947, provides: "Where a registered dock worker available for work fails to comply with any of the provisions of the scheme [for the employment of registered dock workers] . . . the local board may . . . (*c*) give him seven days' notice of termination of employment . . ." The local board has no power to delegate this power to a disciplinary committee.

On October 29, 1952, the plaintiff, who was in a reserve pool of dock workers which was maintained under a scheme laid down by the Dock Workers (Regulation of Employment) Order, 1947, was told to report for work to a company of stevedores. He did not so report and the company notified the defendants by letter dated October 30. On the same day the complaint was passed on to the plaintiff by the defendants, who asked for his explanation. On November 13 the plaintiff's case was considered by a disciplinary committee appointed by the local board and consisting of two members, one representing employers and the other employees. The committee agreed to give the plaintiff seven days' notice to terminate his employment with the defendants. The plaintiff appealed to the appeal tribunal, which dismissed his appeal. He left the defendant's employment on November 22. In February, 1953, he commenced proceedings for damages in Southampton County Court. The action was transferred to the High Court and on January 12, 1954, the plaintiff delivered his statement of claim in which he claimed a declaration that his purported dismissal was illegal, *ultra vires* and invalid, and damages. He alleged that he ceased to be employed by the defendants as from November 22, 1952, but in May, 1954, this allegation was amended to read that as from November 22, 1952, the plaintiff ceased to perform duties for or on behalf of or at the request of the defendants and they ceased to pay wages to him, and a new paragraph was added to the statement of claim in which it was pleaded that the defendants repudiated their contract of employment with the plaintiff, that the plaintiff elected to treat the contract as discharged, and that "alternatively the plaintiff elected to treat the said contract as still subsisting." Ormerod J. held that there had been non-compliance with the scheme by the defendants, in that the local board had no power under the scheme to delegate its functions to a disciplinary committee, and that the proceedings were, therefore, a nullity. He granted the declaration sought by the plaintiff and awarded him £250 damages. The defendants appealed. *Held,* (1) following *Barnard* v. *National Dock Labour Board, infra,* the delegation to the disciplinary committee was wrong, and therefore the proceedings before it and the appeal committee were null and void; (2) distinguishing *Barnard* v. *National Dock Labour Board* (Jenkins L.J. dissenting), the plaintiff when he delivered his statement of claim in January, 1954, treated himself as wrongfully dismissed by the defendants, and should be regarded as having elected on that date (if he had not done so before) to treat the contract as repudiated and as at an end, so that he was not entitled to the declaration which had been granted, and, even if he had not elected, the granting of a declaration was discretionary and this was a case where damages were the only proper remedy: VINE *v.* NATIONAL DOCK LABOUR BOARD [1956] 2 W.L.R. 311; [1956] 1 All E.R. 1, C.A. (considering *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18; [1953] 2 W.L.R. 995; [1953] 1 All E.R. 1113). (This case is discussed on p. 11, above.)

*Discretion.* The Prevention of Fraud (Investment) Act, 1939 (as amended by the Companies Act, 1947, s. 117), s. 16 provides: (1) The Board of Trade may by order declare to be an authorised unit trust scheme for the purposes of this Act any unit trust scheme in relation to which the Board are satisfied that the following conditions are fulfilled (*c*) that the scheme is such as to secure that any trust created in pursuance of the scheme is expressed in a deed providing *to the satisfaction of the Board* for the matters specified in the Schedule to the Act.

In 1936, the plaintiff company constituted a unit trust scheme of which the plaintiff was the manager. In 1953, proposals were made for the continuance of the scheme by means of a trust deed which was submitted to the Board of Trade. That deed contained a provision under which the manager was given power to make an initial service charge, and which was expressed as follows: "'The initial service charge' means a charge which may be included in the sale price . . . of a unit and which shall not exceed 5½ per cent. of the sale price of such unit. . . ." The Board of Trade took objection to that provision on the ground that the initial service charge of 5½ per cent. was excessive, and objected again when 5 per cent. was put forward by the plaintiff company. *Held,* that the plaintiff company was bound to set forth in its deed the matters specified in the Schedule but that must be done to the satisfaction of the Board; that if the Board is not satisfied with the terms of the provisions in a deed relating to matters prescribed in the Schedule, it is open to the Board of Trade to take objection; and that therefore the Board of Trade was entitled to refuse to make an order pursuant to section 16 of the Act: ALLIED INVESTORS' TRUSTS LTD. *v.* BOARD OF TRADE [1956] 2 W.L.R. 224; [1956] 1 All E.R. 162, Danckwerts J.

The Legal Aid (Assessment of Resources) Regulations, 1950, reg. 9 (2) provides that the determination of the National Assistance Board shall be final.

A wife who had been granted a civil aid certificate with a nil contribution on her application dated August 30, 1951, did not disclose until October 22, 1952, that she had obtained a lucrative contract for six months' employment from October 6, 1952. The matter was referred to the National Assistance Board who held that there should be no reassessment of disposable income. The area committee regarded themselves as bound by the Board's decision but further considered the matter when the Legal Aid (General) (Amendment No. 1) Regulations, 1954, were made. Reg. 11 (2A) of these Regulations required the committee to discharge a certificate if " as a result of any information coming to their knowledge they consider that the assisted person no longer has reasonable grounds for taking, defending or being a party to proceedings or, as the case may be, that it is unreasonable in the particular circumstances for him to continue to receive legal aid." The committee decided not to discharge the certificate. *Held,* that reg. 9 (2) of the 1950 Regulations precluded the court from interfering in any way with the determination of the National Assistance Board although, in the view of the court, the result arrived at by the Board was based upon an interpretation of the material regulations which would not bear examination; also that the court could not interfere with the decision of the area committee not to discharge the certificate: MOSS *v.* MOSS [1956] 2 W.L.R. 469; [1956] 1 All E.R. 291, Willmer J.

*Statutory purpose.* It is well settled that a railway company can grant an easement of a way or dedicate a path to public use over its land provided that the grant or dedication is not inconsistent with the statutory purposes for which the land was acquired.

The appellants had made an application pursuant to section 31 of the National Parks and Access to the Countryside Act, 1949, for a declaration that no public right of way existed over a bridge spanning a railway owned and occupied by them. The right of way in question was a footpath crossing the railway line by means of the bridge in question. The appeals committee of quarter sessions had found that there had been a dedication and had accordingly refused to make the declaration sought by the appellants. The appellants contended that the dedication of the alleged right of way was incompatible with the statutory objects of their predecessors in title whose undertaking was now vested in them. They relied on the provisions of section 68 of the Railways Clauses (Consolidation) Act, 1845, which required them to provide (*inter alia*) bridges and passages under or leading to or from the railway as might be necessary for the accommodation of the owners and occupiers of lands adjoining the railway, and on section 16 of the Act which enacted (*inter alia*) that they might from time to time alter, repair or discontinue the works and substitute others, and they contended that if this passage over the bridge were dedicated the effect would be to deprive them of a statutory right to remove it should it no longer be required as an accommodation work. *Held,* the dedication or the creation of an easement could not be *ultra vires* so long as it was not inconsistent with the statutory purpose for which the appellants were incorporated; quarter sessions came to a correct decision and the appeal must be dismissed: BRITISH TRANSPORT COMMISSION *v.* WESTMORLAND COUNTY COUNCIL; SAME *v.* WORCESTERSHIRE

County Council [1956] 2 W.L.R. 428; [1956] 1 All E.R. 321, D.C. (applying *R.* v. *Leake* (1833) 5 B. & Ad. 469; *Birkdale District Electric Supply Co.* v. *Southport Corpn.* [1926] A.C. 355; and *Att.-Gen.* v. *Great Eastern Ry.* (1880) 5 App.Cas. 473; distinguishing *Ayr Harbour Trustees* v. *Oswald* (1883) 8 App. Cas. 623).

## Public Health

### Sewerage

*Jurisdiction of county court.* Section 293 (1) of the Public Health Act, 1936, provides: "Any sum which a council are entitled to recover under this Act, and with respect to the recovery of which provision is not made by any other section of this Act, may be recovered either summarily as a civil debt, or as a simple contract debt in any court of competent jurisdiction." The words "with respect to the recovery of which provision is not made by any other section of this Act" mean unless provision is made for the manner of its recovery in any other section. Section 24 (3) of the Act provides that "any question arising under this section as to whether any length of sewer is one to which this section applies, as to the necessity for any work carried out by a local authority, as to the amount, or the reasonableness, of the expenses incurred by them, or as to the fairness of any division or apportionment of expenses made by them, may be determined by a court of summary jurisdiction either in proceedings taken by the local authority for the recovery of expenses incurred by them, or on the application of any owner concerned." This subsection does not provide for the manner in which the sums can be recovered. It is merely a provision defining the right of the owner to raise certain questions in a particular manner, and, therefore, does not preclude the local authority from recovering sums claimed under section 24 in the county court or High Court.

*Quaere*: on the hypothesis that proceedings under section 24 can be taken in the county court, what defences the owner can raise and which of them can be adjudicated on by the county court or other competent court before which the matter is brought.

The corporation, the plaintiffs, claimed the sum of £13 due to them from the owner in respect of the apportioned cost of works of maintenance carried out in pursuance of their statutory powers to a length of sewer to which section 24 of the Public Health Act, 1936, applied, serving, *inter alia*, premises of which the defendant was the owner. The owner disputed the corporation's claim on a number of grounds which the county court judge found to be unjustified, but he dismissed the plaintiff's action for want of jurisdiction. *Held*, on appeal, the county court judge had jurisdiction to determine this case and should have given judgment for the plaintiffs for the sum of £13: Great Yarmouth Corporation *v.* Gibson [1956] 1 All E.R. 113, C.A. (Birkett L.J. dissenting); (reversing decision of Judge Carey Evans).

## Remedies

### Certiorari

*Cross-examination on affidavit.* See *R.* v. *Stokesley, Yorkshire, Justices, ex p. Bartram* (p. 166, above).

### Declaration

*Discretionary nature.* See *Vine* v. *National Dock Labour Board* (p. 167, above).

### Habeas Corpus

*Extradition.* Section 10 of the Fugitive Offenders Act, 1881, provides that a superior court may discharge a fugitive "by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise."

C., a student nurse in this country, was committed to prison by the magistrate at Bow Street under the Fugitive Offenders Act, 1881, to await her return to Jamaica for alleged offences of embezzlement. On an application by C. for a writ of habeas corpus, her counsel stated that she was employed as an assistant post-mistress and countersigning clerk at a post office in Jamaica and that the prosecution had alleged that whereas she should have entered two sums of £2 and two sums of £1 in the books, she kept them for herself. In her affidavit C. said that she was innocent of the charges alleged against her and that before she left Jamaica she sent the sum of £6, the amount involved in the charges, to the police. It was submitted that although the nature of the case might not be " trivial " within the meaning of section 10 of the Act of 1881, it came within the word " otherwise " in that section, which meant that in all the circumstances it would be harsh and oppressive to send C. back to Jamaica. *Held,* that notwithstanding the amount involved, this was a matter which ought to be inquired into and the court ought not to prevent such inquiry taking place in Jamaica; accordingly, the application would be dismissed: *Re* CLEMETSON [1956] Crim.L.R. 50, D.C.

*Excessive bail.* T. was charged with the robbery of 3s. on December 4, 1955, at Clapham Common. He appeared before the magistrate on Monday, December 5, 1955, when there was an adjournment for seven days, T. being held in custody. On the adjourned preliminary hearing on December 12, 1955, counsel appeared on behalf of T. Owing to the pressure of other court work the preliminary hearing was again adjourned for seven days. Bail was at first refused, but on representation being made by counsel to the learned magistrate, bail was granted in T.'s recognisance of £100 and one other surety of £500. This bail was so excessive as to make it impossible for T. to avail himself of it. Application was, therefore, made *ex parte* to the Divisional Court for a writ of habeas corpus on the grounds that the imposition of such excessive bail amounted to a grant of no bail and contravened the Bill of Rights, 1688, and thus made T.'s imprisonment unlawful.

*Held,* that the correct procedure had been adopted in the circumstances. It was further stated that in the eighteenth and early nineteenth centuries habeas corpus was often used for the purpose of obtaining bail. The application was adjourned until after the further hearing in the magistrates' court in order that notices might be served. Counsel was asked to request the learned magistrate either to reduce the amount of bail sought or to acquaint the High Court with his reasons for imposing such high bail. The magistrate accepted bail of £100 and one surety of £100 and the application for habeas corpus was dismissed: *Ex p.* THOMAS [1956] Crim.L.R. 119.

## SCOTLAND

See GOVERNMENT FUNCTIONS AND APPOINTMENTS (p. 144, above); MONOPOLIES AND RESTRICTIVE PRACTICES (p. 151, above); NATIONALISED INDUSTRIES (p. 161, above); PRACTICE (p. 166, above); SUBORDINATE LEGISLATION (this page); TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (p. 173, below).

## SUBORDINATE LEGISLATION

### Parliamentary proceedings

*Select Committee on Statutory Instruments (House of Commons).* On January 31, 1956, the Committee considered forty-three Instruments and resolved that it was unnecessary to draw the special attention of the House to them. The Committee ordered that the Secretary of State for Scotland be requested to submit a Memorandum in explanation of the Transfer of Functions (Roads, Bridges and Ferries) Order, 1955 (S.I. 1955 No. 1955), and that the Secretary of State for the Colonies be requested to submit a Memorandum and to depute a representative to appear before the Committee for the purpose of explaining the Police (Overseas Service) (Cyprus) Regulations, 1955 (S.I. 1955 No. 1852) (H.C. 16—VIII of 1955–1956).

On February 14, 1956, the Committee made their Second Report and drew the special attention of the House to S.I. 1955 No. 1852 (above) on the ground that they appeared to make an unexpected use of the powers conferred by the statute under which they were made.

On February 14, 1956, the Committee considered ten Instruments and resolved that it was unnecessary to draw the special attention of the House to them. The Committee ordered that the Minister of Agriculture, Fisheries and Food be requested to submit a Memorandum in explanation of the Prevention of Damage by Pests (Application to Shipping) (Amendment) Order, 1956 (S.I. 1956 No. 89) (H.C. 16—IX—I of 1955–1956).

On February 28, 1956, the Committee made their Third Report and drew the special attention of the House to S.I. 1956 No. 89 (above) on the ground that it appeared to make an unexpected use of the powers conferred by the statute under which it was made (H.C. 16—X of 1955–1956).

*Special Orders Committee* (*House of Lords*). The Committee considered five sets of regulations and reported in the case of each, according to their terms of reference, that the regulations (a) did not raise important questions of policy or principle, (b) were founded on precedent (except in one case) and (c) could be passed by the House without special attention and that no further special inquiry was necessary before the House proceeded to a decision on the Resolution to approve (Eighth Report; H.L. (91) of 1955–1956).

### Statutory provisions

*Effect of regulations.* The obligation of a special regulation, such as reg. 10 (*c*) of the Woodworking Machinery Regulations, 1922, where such regulation has been duly complied with, must be regarded as substituted for the more general obligation as to fencing contained in section 14 of the Factories Act, 1937.

The plaintiff, who was employed by the defendants at their furniture factory, was working at a circular saw. The saw had been set up and fenced for the purpose of cutting timber, so as to comply with reg. 10 of the Woodworking Machinery Regulations, 1922–1945. After cutting each length of timber a piece of wood, called an off-cut, remained on the bench at the side of the saw after the saw had passed through the timber. The plaintiff was engaged in removing the off-cuts from the bench in the manner in which she had been trained, *i.e.*, she moved to the side of the saw and, using her push-stick, flicked away the off-cuts whilst the saw was in motion, when her fingers came into contact with the saw and she sustained injuries. The plaintiff claimed damages for personal injuries. Oliver J. held [1955] 1 W.L.R. 971 that, although the circular saw had been correctly fenced for the purpose of operation as a saw in compliance with reg. 10 of the Woodworking Machinery Regulations, 1922, the defendants were liable for a breach of section 14 of the Factories Act, 1937. *Held,* on appeal, the employers had fulfilled their duty in regard to the circular saw if they provided that which they had to provide under the regulations as a guard for the circular saw and section 14 of the Factories Act, 1937, did not apply; there must be a new trial upon the issue as to negligence or breach of duty under the common law: STRINGER *v.* AUTOMATIC WOODTURNING CO. [1956] 1 W.L.R. 138; [1956] 1 All E.R. 327, C.A. (reversing decision of Oliver J. [1955] 1 W.L.R. 971; applying *Miller* v. *Boothman and Sons* [1944] K.B. 337; distinguishing *Benn* v. *Kamm & Co.* [1952] 2 Q.B. 127).

## TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

### General

*Agriculture.* Under section 1 of the Agricultural Marketing Act, 1931, a scheme regulating the marketing of an agricultural product by the producers thereof may be submitted to the Minister and the Minister may approve the scheme. Before approving, the Minister must publicise notice of the submission of the scheme and objections and representations may be made. The Minister may appoint a competent and impartial person to hold an inquiry. After approval by the Minister the scheme must be approved by resolutions of both Houses of Parliament.

The Minister of Agriculture, Fisheries and Food, the Secretary of State for Scotland and the Secretary of State for the Home Department (for Northern Ireland), acting jointly, have directed that a Public Inquiry be held under these provisions into objections to the British Egg Marketing Scheme, submitted to them on October 28, 1955. The Ministers have appointed Mr. G. G. Baker, Q.C., to hold the Inquiry which opened on February 20, 1956. The Inquiry is held in accordance with the Agriculture Marketing (Public Inquiry) Rules, 1949 (S.I. 1949 No. 2094). 702 objections and 201 representations have been received during the specified period which ended on December 20, 1955.

The Scottish Land Court has made its thirty-fourth Report which is for the year 1954 under the following headings: Circuits; Personnel; Agriculture (Scotland) Act, 1948, and Agricultural Holdings (Scotland) Act, 1949; Small Landholders (Scotland) Acts, 1886 to 1931; Statistical Tables and Summaries (The Scottish Land Court: Report on Proceedings (Cmd. 9689)).

*Committee.* The Committee on Administrative Tribunals and Enquiries (Chairman: Sir Oliver Franks) has been appointed with the following terms of reference: "To consider and make recommendations on (a) the constitution and working of tribunals other than the ordinary courts of law, constituted under any Act of Parliament by a Minister of the Crown or for the purposes of a Minister's functions; (b) the working of such administrative procedures as include the holding of an inquiry or hearing by or on behalf of a Minister on an appeal or as the result of objections or representations, and in particular the procedure for the compulsory purchase of land."

The Committee have received written evidence from Government Departments in reply to a factual questionnaire addressed to them by the Committee. They have also heard oral evidence, at public sittings, from the Ministries of Education, Labour and National Service, Pensions and National Insurance, Housing and Local Government, Agriculture, Fisheries and Food, Transport and Civil Aviation, and Health; and from the National Assistance Board, the Lord Chancellor's Department, the Scottish Office and the War Office.

*Jurisdiction of Tribunal.* See *Vine* v. *National Dock Labour Board* (p. 167, above); *Heptulla Brothers, Ltd.* v. *Thakore* (p. 140, above).

### Agricultural Land Tribunals

*Appointment.* The Lord Chancellor has appointed Mr. Lionel Jellinek to be Chairman of the Agricultural Land Tribunal for the south-eastern area in place of Judge Hillard who resigned on his appointment to the County Court Bench (*The Times*, January 14, 1956).

### Lands Tribunal

*Jurisdiction.* See British Transport Commission Act, 1955, under NATIONALISED INDUSTRIES (above, p. 164).

The decisions of this Tribunal are not, in the main, matters of public law and readers who wish to refer to them will find them digested in the *Journal of Planning and Property Law*; a number are fully reported in *Planning and Compensation Reports* and all are listed in *Current Law*. Decisions which concern the jurisdiction of the Lands Tribunal are matters of public law and will be noted here as they arise.

*Planning appeals.* The Minister of Housing and Local Government stated that where possible rather more uniformity in the method of presenting appeal decisions was desirable and that he was considering how this might best be achieved.

The Minister was asked if he would issue instructions to local planning authorities to give to appellants prior notice of the plans and maps that were to be produced and copies of the written statements it was intended to put in. He replied that he believed local authorities did not normally deny appellants access to documents and maps (549 H.C. Deb., 995, February 28, 1956).

*Rent Tribunals.* The Minister of Housing and Local Government stated that general guidance had been given to rent tribunals in a series of memoranda, issued before the change of Government which he would put in the Library (549 H.C. Deb., 997, February 28, 1956). He subsequently stated that thirty-six memoranda had been issued to tribunals since January, 1952 (550 H.C. Deb., *173–174*, March 27, 1956).

He stated that as part of the review of the Rent Acts he would inevitably have to examine the jurisdiction, procedure and general working of rent tribunals; that he had no reason to be dissatisfied with the personnel of rent tribunals in general; that the power to dismiss members had been used in four cases since October, 1951, and in a number of other cases persons known not to be suitable had either resigned or not been reappointed; and that it was not easy to find people willing to be members of rent tribunals (549 H.C. Deb., 998–999, February 28, 1956).

He stated that thirty-eight chairmen of rent tribunals were people with legal training; thirty-five chairmen had been appointed or reappointed since January, 1952 and of these twenty-eight were barristers or solicitors (549 H.C. Deb., 997, February 28, 1956; 550 H.C. Deb., *175*, March 27, 1956).

The Minister gave information showing how many applications had been considered, since 1946, by the Rent Tribunal for Battersea, Wandsworth, Wimbledon and Mitcham under the Furnished Houses (Rent Control) Act, 1946, the Landlord and Tenant (Rent Control) Act, 1949, and the Housing Repairs and Rents Act, 1954; and what was the number of decisions in which rents were reduced, increased, dismissed or withdrawn respectively (550 H.C. Deb., *174*, March 27, 1956).

*Transport Tribunal.* The Tribunal continued its hearings in the matter of the Application of the British Transport Commission (1955, No. 2), to confirm the British Transport Commission (Railway Merchandise) Charges Scheme. It sat from January 11, 1956 (twenty-first day of hearing) to March 7, 1956 (forty-fourth day of hearing) (Reference: 88–95–21 to 88–95–44).

## WALES

### Status

*Nationalist Party.* Plaid Cymru, the Welsh Nationalist Party, stated that their objective was complete self-government; that they sought Dominion or Commonwealth status; that they had co-operated with the movement for a Welsh Parliament on federal lines (*The Times*, January 7, 1956).

The Welsh Council of Labour executive committee stated that five Welsh M.P.s were to be reported to the national executive of the Labour Party for taking part in a campaign for a Parliament in Wales (*The Times*, January 24, 1956).

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS (p. 144, above); WIRELESS AND TELEVISION (p. 175, below).

### WIRELESS AND TELEVISION

**British Broadcasting Corporation**

*Welsh service.* The Postmaster-General stated that with the concurrence of the Home Secretary and Minister for Welsh Affairs he had appointed a Committee consisting of Sir Godfrey Ince, G.C.B., K.B.E. (Chairman), Mr. H. V. Lloyd-Jones, Q.C., and Mr. John Beavan: "To inquire into and report on the allegations made in the House of Commons on January 30, 1956, of bias in the preparation, content or presentation of the news, talks and discussion programmes in the Welsh service of the B.B.C." These terms of reference had been agreed to by the B.B.C. and the Broadcasting Council for Wales (549 H.C. Deb., *130–131*, February 29, 1956).

One such allegation was made by Mr. David Llewellyn, M.P., who said: "I make the direct charge in this House of Commons that there is a distinct bias on the Welsh Region of the B.B.C. in favour of Welsh Nationalism and Plaid Cymru, in favour of the Parliament of Wales Campaign and in favour of the individuals who support those movements" (548 H.C. Deb., 620, January 30, 1956).

## COMMONWEALTH AND DEPENDENT TERRITORIES

**General**

*Colonial territories—adult suffrage.* The Secretary of State for the Colonies stated that there was no elected membership in the legislatures and, consequently, no franchise in the following territories: Aden Protectorate, Brunei, Cyprus, Hongkong, North Borneo, St. Helena, Sarawak, Somaliland Protectorate, Tanganyika, Uganda, Western Pacific and Zanzibar.

He stated that limited adult suffrage in elections to territorial legislatures existed in the following territories: Aden Colony, Nigeria, Sierra Leone (Colony and Protectorate), Gambia (Colony), Mauritius, Seychelles, Fiji, Northern Rhodesia, Kenya, Nyasaland, British Honduras, Bahamas, Bermuda, Federation of Malaya, Singapore. (Hansard records the details of the limitation in each case.) Of these territories British Protected Persons are entitled to the vote in: Nigeria, Sierra Leone, Gambia, Kenya (Indians and Arabs), Federation of Malaya, Singapore, Aden Colony (550 H.C. Deb. *116–180*, March 21, 1956.)

*Commonwealth membership.* The Under-Secretary of State for Commonwealth Relations stated that the admission of a new member to the Commonwealth was a matter for consultation between the existing members as and when the occasion arose and that the term "Commonwealth membership" covered what was once known as "Dominion status" (548 H.C. Deb. *41*, January 26, 1956).

*Deportation.* The Minister of State for Colonial Affairs stated that all colonial territories retained the right to deport aliens at their discretion. He also stated that there were fifteen territories whose legislation did not provide for judicial process prior to the deportation of British subjects and protected persons but that six of these had agreed to make such provision (550 H.C. Deb. *183*, March 27, 1956).

*Detention without trial.* The Minister of State for Colonial Affairs stated that at certain dates in February and March, 1956, the number of persons held in detention without trial was: Cyprus, 297; Kenya, 43,513; Federation of Malaya, 683 (of whom 83 were dependants of persons awaiting repatriation and 313 were persons in rehabilitation centres due for release within six months or less); Seychelles, 4 (from Cyprus); Singapore, 15 (550 H.C. Deb. *200*, March 28, 1956).

**Australia**

*Cabinet system.* The reconstituted Commonwealth Government was announced by the Prime Minister (Mr. R. G. Menzies) in Canberra on January 11, 1956. The Cabinet consists of twelve members and there are ten Ministers not in the Cabinet. This increases the size of the Government by two Ministers. Mr. Menzies said that reduction of the Cabinet to twelve members would enable it to concentrate on discussion and reach policy decisions more quickly (*The Times*, January 11, 1956).

*Parliamentary system.* The Governor-General (Field-Marshal Sir William Slim), opening the first session of the newly elected Australian Parliament on February 15, 1956, drew attention to the fact that while the Government had been given a substantially greater majority in the House of Representatives, it would not have a majority in the Senate from July. He said that at present any conflict between the two Houses could be resolved only by the slow, cumbrous and not very satisfactory procedure of a double dissolution; that his advisers believed that the relations between the two Houses should be reviewed; and that they would therefore propose the setting up of an all-party committee of both Houses to investigate the constitutional problems which might be referred to it (*The Times*, February 16, 1956).

See also CONTRACT (p. 139, above).

**British Caribbean**

*Federation proposals.* A conference was held in London, opening on February 7, 1956, and the delegates from Barbados (3), Jamaica (3), The Leeward Islands of Antigua (1), St. Christopher—Nevis—Anguilla (1) and Montserrat (1), Trinidad and Tobago (3), and the Windward Islands of Dominica (1), Grenada (1), St. Lucia (1) and St. Vincent (1), agreed unanimously that their respective countries should be bound together in federation, declared their wish that leave should be sought to introduce a Bill into the United Kingdom Parliament accordingly, and agreed that Federal Elections should take place in the first quarter of 1958. British Guiana and British Honduras, which do not at present intend to participate, sent observers to the conference.

The conference considered the Report of the Fiscal Commissioner (Cmd. 9618), the Civil Service Commissioner (Cmd. 9619) and the Judicial Commissioner (Cmd. 9620), who had been appointed following the Plan for a British Caribbean Federation (Cmd. 8895). The conference reached decisions on a small number of constitutional variations in the Plan, including some changes in the Federal Legislative List, an alteration in the composition of the Federal Executive, and a simplification of the method of revising the Constitution, especially in relation to the possible later admission to the Federation of British Guiana and British Honduras. The conference agreed on the method to be adopted initially for securing Federal revenue; it also agreed to set up a Commission to report to the Federal Government on a customs union, which was considered to be highly desirable in principle. It agreed on the setting up of a Federal Supreme Court but deferred the question of the site of the Federal capital until this had been reported on by an impartial fact-finding commission.

The conference is to remain in existence as a standing body in the West Indies under the name of the Standing Federation Committee. It is envisaged that this Committee will operate as an advisory body to the Governor-General, when he is appointed, until the first Federal Elections have taken place.

Her Majesty's Government have promised assistance to the Federation in various ways including a grant of up to £1m. towards the cost of the Federal capital, facilitation of access by the Federal Government to the London loan market, provision of funds for the continuance of assistance to smaller territories joining the Federation and of funds under the Colonial Development and Welfare Acts.

The Secretary of State for the Colonies intends to seek leave to introduce an enabling Bill, paving the way for an Order in Council embodying the constitution. It is hoped that this Bill will pass all stages before the Summer Recess (see, particularly, 549 H.C. Deb. 1188–1190, February 29, 1956).

See also **Leeward Islands** (p. 181, below).

### Central Africa

*Federal and Territorial Governments.* The Prime Minister of Southern Rhodesia (Mr. Garfield Todd) stated that there was a lack of co-ordination between the Federal and Territorial Governments on general economic issues; that he had suggested the formation of a ministerial planning committee for economic affairs on which Ministers of the Federal Government and the Governments of the three Territories should sit. The Federal Prime Minister (Lord Malvern) said that the Federal Government had agreed—subject to the agreement of the Territories—to set up an inter-governmental planning body consisting of officials of the four Governments. He said: "The difference of opinion between the two Governments on the establishment of a ministerial planning committee for economic affairs is fundamental, and is due to a difference in the conception of the duty of Ministers under our system of government." He also said: "The Federal Government is responsible only to the Federal Parliament and to the electorate all over the Federation—not to the Territorial Governments" (*The Times*, February 11, 1956).

*Secession.* The Secretary of State for the Colonies stated that he had received suggestions from Mr. W. M. Chirwa, a Nyasaland African Member of the Federal Parliament, that Nyasaland should have the right to secede from the Central African Federation and become an independent member of the British Commonwealth, but that any such suggestion was wholly unacceptable to H.M.'s Government, who adhered to the maintenance of the Federal Constitution (548 H.C. Deb. *264–265*, February 15, 1956).

See also **Nyasaland** (below, p. 184).

### Cyprus

*Constitutional proposals.* On January 28, 1956, the Governor of Cyprus (Sir John Harding) sent to Archbishop Makarios a statement of policy from Her Majesty's Government. This stated that it was not the position of the Government that the principle of self-determination could never be applicable to Cyprus but that it was not now a practical proposition on account of the present situation in the Eastern Mediterranean. The statement continued that the Government had offered a wide measure of self-government and that if the people of Cyprus would participate in the constitutional development, it was the intention of the Government to work for a final solution which would satisfy the wishes of the people of Cyprus, be consistent with the strategic interests of the Government and their allies and have regard to the existing treaties to which the Government were a party. The statement concluded that the Government would be prepared to discuss the future of the island with representatives of the people of Cyprus when self-government had proved itself capable of safeguarding the interests of all sections of the community. The Archbishop was asked to say that he found this statement acceptable as a basis on which he would co-operate with the Government of Cyprus in the introduction of a constitution and in the development of self-government and that he would advise his fellow-countrymen to do the same; and that he would use all his influence to bring an end to acts of violence and lawlessness so that constitutional government might be introduced in an orderly manner.

On February 2, 1956, Archbishop Makarios asked for elucidation of "wide measure of self-government" and put forward five "fundamental principles." These were: (1) all legislative, executive and judicial powers, with the exception of those expressly exempted, would originate from the people of Cyprus and would be exercised by them through their elected representatives and other organs; (2) responsibility for defence and external political relations would be excepted from the above principle and vested in the Governor; (3) the Governor, apart from the powers mentioned in (2), would exercise the normal duties of a constitutional head, with no right to veto laws; he would entrust the duty of forming the Government to the person enjoying the confidence of the House and would dissolve on his advice. Ministers would be chosen by the Prime Minister and, like him, be responsible only to the Assembly; (4) representation in the Assembly would be proportional to the composition of the population, otherwise all citizens would have equal rights; (5) a procedure would be defined for the impartial settlement of differences on interpretation of the constitution on questions of disputed authority between Governor on the one hand and Assembly or the Government on the other. The Archbishop also asked that emergency military measures and legislation should be revoked and an amnesty granted for all political offences.

On February 14, 1956, Her Majesty's Government stated that they considered the following points should be taken as a basis for discussion: (a) H.M.'s Government offer a wide measure of self-government now. To this end a new and liberal constitution would be drawn up in consultation with all sections of the community; (b) the constitution would enable the people of Cyprus through responsible Cypriot Ministers to assume control by a suitably phased process over the Departments of Government, except foreign affairs and defence, which would be reserved to the Governor, as would also be public security, for as long as he deemed necessary; (c) the constitution would provide for an Assembly with an elected majority; (d) a Cypriot Premier would be chosen by the Assembly with the approval of the Governor. The Premier would allocate Ministerial portfolios; (e) the constitution would provide for Turkish membership in the Council of Ministers; (f) there would be proper safeguards for the rights of individual citizens, the interests of all sections of the community, and the integrity and independence of the public service.

Further correspondence followed on February 24 and 25 on points arising from these negotiations. On February 26 the Secretary of State for the Colonies flew to Cyprus and on February 29 gave certain undertakings to Archbishop Makarios. These were that when law and order were re-established, there would be an amnesty for all convicted of offences under the Emergency Regulations (or of comparable offences prior to their enactment) which were committed before a date to be settled except those involving violence against the person or the illegal possession of arms, ammunition or explosives. The release of detainees would begin at the same time. The Governor would repeal all Emergency Regulations at a pace commensurate with that of the re-establishment of law and order. H.M.'s Government intended to send a Constitutional Commissioner to Cyprus to draw up a liberal and democratic constitution on the lines previously indicated and it would be for the Commissioner to recommend the precise composition of the elected majority which he would define in accordance with normal liberal constitutional doctrine.

H.M.'s Government stated that three issues divided the two sides in the final stages. These were the amnesty (where the disagreement was on offences of the possession of arms), the Governor's responsibility for public security (for which the Archbishop wanted a time limit), and the composition of the Assembly and powers of the Constitutional Commissioner.

On March 9, 1956, the Governor of Cyprus ordered the deportation of Archbishop Makarios, the Bishop of Kyrenia and two others under Regulation 7 of the Emergency Powers Regulations in Cyprus. This was done after full consultation with H.M.'s Government and with their entire approval (see particularly Cyprus: Correspondence exchanged between the Governor and

Archbishop Makarios (Cmd. 9708). 549 H.C. Deb. 1725–1733, March 5, 1956; 550 H.C. Deb. 31–35, March 12, 1956; *ibid.*, 389–525, March 14, 1956).

*Social Insurance.* A draft Bill has been published which provides cash benefits for marriage, maternity, sickness, unemployment, widowhood, orphanhood, old age and death. The scheme is based on compulsory and equal contributions from employers, employed and the State. The Fund created will bear the costs of the benefits and administration. The system of stamps on insurance cards will be used. A local tribunal consisting of independent chairman, employers' representative and workers' representative will give final decisions on fact; on points of law there will be an appeal to an umpire appointed by the Governor (Commonwealth Survey, C.O.I., February 7, 1956).

**Gibraltar**

*Status.* The Secretary of State for the Colonies stated that the attitude of H.M.'s Government on the status of Gibraltar remained unchanged. The Government had no intention of modifying it and there had been no discussion with the Spanish Government on the subject (548 H.C. Deb. *265–266*, February 15, 1956; see also *ibid.*, 2112–2137, February 13, 1956).

The Secretary of State for the Colonies stated that he was not yet in a position to make a statement on the proposals which had been submitted to him for constitutional reform but he hoped to be in a position to do so shortly (550 H.C. Deb. *115*, March 21, 1956).

**Gold Coast**

*Courts.* In Ord. 41 in the 3rd Sched. to the Courts Ordinance (Gold Coast) (Laws of the Gold Coast, 1936 Rev., c. 4) the words " judgment or decision given by him " contemplate a judgment or decision formulated by a court for reasons, stated or unstated, which the court had thought to be sound. A court may review the judgment or decision when it thinks that some or all of those reasons need further consideration, but the court has no jurisdiction to review a consent judgment under this Order.

An action instituted in the Divisional Court of the Supreme Court of the Gold Coast by the respondent against the appellant for declaration of title to a house was settled and the terms of settlement embodied in a minute headed " Court notes of compromise and order thereon, which concluded " judgment accordingly " and was signed by the judge. On an application by the respondent to issue execution against the appellant on that consent judgment, the appellant contended that the Divisional Court had no jurisdiction to make the consent order, and that the minute was not a judgment on which execution could be issued. *Held,* (1) assuming that this was a case in which the Native Court had jurisdiction, neither party had endeavoured to oust the jurisdiction of the Supreme Court by bringing the requisite circumstances, if they existed, to the notice of that court, and its judgment was therefore the judgment of a court of competent jurisdiction; (2) the minute was a minute of a judgment on which execution could issue; and the court had no jurisdiction subsequently to review the consent order: ELIZABETH ANIMA *v.* AKWASI AHYEYE (SUBSTITUTED FOR KWAME DWAA, DECD.) [1956] 2 W.L.R. 299, P.C.

*Regional devolution.* Sir Frederick Bourne, who is advising the Gold Coast Government, made a report issued on December 23, 1955, which recommended a very substantial transfer of power from the centre to the regions, and the establishment of a Regional Assembly where the majority of District Councils desired it. To discuss this and other similar questions, Dr. Nkrumah, the Prime Minister, called a Round Table Conference which the Northern Territories Council and the National Liberation Movement and its associates refused to attend. The Secretary of State for the Colonies has said that it is the intention of the Government that the Gold Coast should achieve the status of full self-government within the Commonwealth at the earliest practicable date (548 H.C. Deb. *114–115*, February 1, 1956; 549 H.C. Deb. *40–41*, February 22, 1956; *ibid.*, 1167–1168, February 29, 1956; Commonwealth Survey, C.O.I., January 10, 1956).

### Jamaica

*Constitution.* The Governor announced on March 15, 1956, that a new constitution designed to give Jamaica full internal self-government might be achieved this year. The Governor said that the new constitution would provide for the introduction of a Ministerial system, a police commission to work with an elected Minister of Home Affairs, and a judicial service commission (*The Times*, March 15, 1956).

See also **British Caribbean** (p. 176, above).

### Kenya

*Emergency measures.* The Minister of State for Colonial Affairs stated that as a result of the success of the military campaign against Mau Mau, reductions had been made in the number of capital offences under Emergency Regulations, delegated powers to make detention orders had been withdrawn to the Governor, and the application of remaining emergency powers was being progressively relaxed in all areas where the security situation permitted (549 H.C. Deb. 1186, February 29, 1956). He further stated that, on February 13, 1956, 43,516 persons were in detention on Detention Orders; up to the end of January, 22,000 detained persons had been released, at an average rate during the last three months of 2,250 a month (*ibid., 124*).

*Franchise.* In February, 1955, Mr. W. F. Coutts was appointed Special Commissioner to make an investigation to determine the best method of electing Africans to the Kenya Legislative Council. His report was laid before the Legislative Council on January 10, 1956, together with a White Paper outlining the views of the Kenya Government.

Mr. Coutts recommended: (a) universal adult franchise should not be introduced at present; (b) direct voting by secret ballot should be adopted for all African elections; (c) up to ten points should be allocated to male and female Africans according to qualifications based on age (twenty-one or over), education, long and efficient public or private service, income and property; (d) a minimum of three points should entitle an elector to one vote; (e) each additional point should entitle an elector to a further vote; (f) in addition, there should be a residential qualification of six months; (g) there should be certain disqualifications from voting (these included not being a British subject, not having taken an oath of allegiance to Her Majesty, not being an African of local birth, having been convicted of certain offences and being of unsound mind); (h) the nominated candidate should have certain qualifications (these included being fluent in English and having property of £700 or an annual income of £240); (i) the candidate should be disqualified if, *inter alia*, he owed allegiance to a foreign Power; (j) civil or local government candidates should be granted leave in order to stand as candidates but, if elected, should resign.

Particular limitations were, under Mr. Coutts's recommendations, to apply to Central Province. In accordance with their wishes the inhabitants of Northern Frontier Province should not take part in 1956 elections but the position should be reviewed prior to the 1960 elections.

The Kenya Government in its White Paper accepted in principle the basic proposal for a qualitative franchise coupled with a system of multiple voting but put forward certain modifications. Included in these were that the attainment of the age of twenty-one years should be a prerequisite but not a " point-earner," and to obtain a vote an elector need only qualify in one of seven specified categories and that qualification in additional categories would earn *pro rata* additional votes to a maximum of three. The seven categories were (1) completion of intermediate school course or equivalent; (2) income of £120 or property worth £500; (3) long service in public, commercial, industrial or agricultural employment; (4) the grade of Elder or the age of forty-five years; (5) degree or diploma or professional qualification; (6) past or present membership of certain central or local government bodies; (7) the award of a civil or military decoration. On disqualifications, the Government omitted the oath of allegiance. On qualification for candidature, the Government suggestions included being a registered elector aged twenty-five years or over, an educational qualification of intermediate school standard and either an annual income of £240 or an annual income of £120 plus one additional qualification in the seven specified categories for voters. The Government would also disqualify certain Government servants from candidature.

The Kenya Government intends that the elections of African members should take place before March, 1957. (Commonwealth Survey, C.O.I., January 24, 1956.)

*Rent Control Board—jurisdiction.* See COURTS (p. 140, above).

**Leeward Islands**

*Status.* The Leeward Islands Act, 1871, provided for a federal constitution under which the four Presidencies (Antigua, St. Christopher Nevis and Anguilla, Montserrat and the Virgin Islands) became one colony. The Leeward Islands Act, 1956, provides that each shall now become a separate colony and confers upon Her Majesty in Council power to make, or to authorise the making of, emergency laws and to establish courts. The Act was passed to meet the wishes of the representatives of the people concerned and to enable the four groups to enter the Caribbean federation as separate bodies (for Second Reading debate in the House of Commons, see 546 H.C. Deb. 1771–1792, November 24, 1955).

See also **British Caribbean** (p. 176, above).

**Malaya**

*Status.* The Federation of Malaya Constitutional Conference was held in London from January 18 to February 6, 1956. It was attended by a delegation from Malaya consisting of four representatives of Their Highnesses the Rulers and the Chief Minister and three other Alliance Ministers. The High Commissioner, accompanied by some of his senior advisers, was in attendance. The Secretary of State for the Colonies in opening the Conference said that the Conference was agreed on the direction of the progress which it wanted to make; this was to secure the early establishment of a fully self-governing and independent Federation within the Commonwealth on the basis of parliamentary institutions.

The proposals of the Conference are subject to the approval of the United Kingdom Government and of the Malayan Conference of Rulers. They may be summarised as follows: (1) Defence and Internal Security. (a) Interim period before full self-government. A Malayan Minister to be styled Minister for Internal Defence and Security should be appointed. He would act as Chairman of a temporary Emergency Operations Council. Steps should be taken to enable the Federation armed forces to be administratively self-contained and for this purpose there should be set up forthwith a permanent Federation Armed Forces Council under the chairmanship of the Minister for Internal Defence and Security. To prepare for the time when responsibility passed to the Federation Government, there should be set up a temporary External Defence Committee under the chairmanship of the High Commissioner. (b) After full self-government there should be a Defence and Mutual Assistance Treaty entered into between the Government of the United Kingdom and the Government of the Federation. (2) Financial and Economic Matters. Responsibility for all financial matters should be transferred at once to a Malayan Minister of Finance. An Economic Committee of the Executive Council is to be set up under the chairmanship of the Chief Minister. After the attainment of full self-government substantial help would still be available from the United Kingdom. (3) The Public Service. There should be established as soon as possible a Public Service Commission which should be independent and free from political influence, its members appointed by the High Commissioner after consultation with the Chief Minister. Also there should be established a Judicial Service Commission and a Police Service Commission. (4) Constitutional Changes. A number of agreed proposals were recorded affecting the position of the High Commissioner and Executive Council, the composition of the Executive and Legislative Councils and the withdrawal of British advisers. The Conference also agreed on recommendations for the composition and terms of an independent Constitutional Commission to be appointed as soon as possible. These recommendations were approved by Her Majesty and the Conference of Rulers. It was also agreed that, in view of the Malayan delegation's desire that full self-government and independence within the Commonwealth should be proclaimed by August, 1957, if possible, a constitution so providing should be introduced at the earliest possible date consistent with the importance of the task before the Constitutional Commission and that every effort would be made by Her Majesty's Government and the Federation Government to achieve this by the time proposed.

The Constitutional Commission is a small body selected in agreement with the Conference of Rulers and the Alliance Ministers. It will have a United Kingdom chairman and one other U.K. member; Canada, Australia, India and Pakistan will each be invited to provide a member. The terms of reference are, in summary, to examine the present constitutional arrangements and to make recommendations for a federal form of constitution for the whole country as a single, independent self-governing unit within the Commonwealth based on parliamentary democracy with a bi-cameral legislature. The Rt. Hon. Lord Reid, LL.D., F.R.S.E., has accepted appointment as Chairman of the Commission. (Report by the Federation of Malaya Constitutional Conference (Cmd. 9714); 548 H.C. Deb. 2371–2376, February 15, 1956; 550 H.C. Deb. *45–46*, March 14, 1956.)

### Malta

*Status.* On July 28, 1955, the Prime Minister announced the composition and terms of reference of a Round Table Conference, comprising representatives of all political parties at Westminster. The terms of reference were: To consider constitutional and related questions arising from proposals for closer association between Malta and the United Kingdom and, in particular, from the proposal that Malta should in future be represented in the Parliament at Westminster; to consult representatives of the political parties in the Legislative Assembly of Malta, and such other persons as may seem fit to them; to report their conclusions and recommendations.

The conclusions and recommendations of the Conference dealt with (a) economic development; (b) constitutional changes. Under (b) the Conference concluded that " the road to full self-government is blocked, in that the Parliament in Westminster must, in order to maintain the defences of Malta and the facilities necessary to enable it to fulfil its role as one of the principal Commonwealth and N.A.T.O. bases in the Mediterranean, exercise overriding powers in Malta in the fields of defence and foreign affairs " (para. 70). They also concluded that certain proposals made for " quasi-Dominion " status would not be workable (para. 71). The Conference concluded that " representation at Westminster is practicable and reasonable, and, subject to the considerations mentioned above, we recommend its acceptance by Her Majesty's Government in the United Kingdom and by the Parliament at Westminster " (para. 82). One of the considerations referred to was that it was " for the Maltese people themselves to determine and to demonstrate clearly and unmistakably whether the proposals of the Maltese Government [for representation at Westminster] do indeed correspond to their own wishes " (para. 80). The Conference suggested that there should be three representatives at Westminster and that they should be elected in exactly the same way, and under the same laws governing representation of the people and electoral practices, as are Members from the United Kingdom (para. 81). Two members of the Conference (Rt. Hon. J. S. Maclay and Mr. Kenneth Pickthorn stated that they were " unable to join in the recommendation that there should be Maltese representation in the British House of Commons at this stage " (pp. 27–28). (Report of the Malta Round Table Conference, 1955 (Cmd. 9657).)

The Maltese Government decided to hold a referendum on the question of representation at Westminster on February 11 and 12, 1956. The Prime Minister of H.M.'s Government stated that this decision and the timing, content and manner in which the referendum was conducted were matters for the Maltese Government and courts (548 H.C. Deb. *3–4*, January 24, 1956). On February 1, 1956, the Secretary of State for the Colonies recalled the statement of the Prime Minister of H.M.'s Government of November 10, 1955, that H.M.'s Government would take no action to prejudice the position of the Roman Catholic Church in Malta and added that H.M.'s Government would not commend to Parliament any proposals which ran counter to the assurances given to the Archbishop of Malta by representatives of the Round Table Conference as set out in para. 79 of its Report (this para. 79 stated that in the opinion of the Conference " the Maltese Parliament would continue, under any new constitutional arrangements which could be envisaged, to exercise authority in all fields in which the Church is directly concerned, and that the Parliament at Westminster had no desire whatever to intervene in such fields and, following its long-standing tradition, would not so intervene ") (548 H.C. Deb. 926–928, February 1, 1956).

Miss Mabel Strickland, the leader of the Progressive Constitutional Party, brought an action in the courts in Malta for a declaration to the effect that the warrant issued by the Governor fixing dates for the referendum was beyond the powers of his commission and therefore null and void. A writ of summons was filed on her behalf citing the Governor and the referendum commissioners. The Civil Court in Malta held that the Governor was not subject to the jurisdiction of local courts. The Malta Court of Appeal upheld this decision on January 23, 1956, and disallowed Miss Strickland's request for leave to appeal to the Privy Council on the ground that this was an accidental issue which left unprejudiced the merits of the case concerning the validity of the Governor's warrant.

On February 15, 1956, the Secretary of State for the Colonies stated that the voting in the referendum, in which 59·12 per cent. of those on the electoral register voted, to determine whether or not the Maltese people were in favour of proposals submitted by the Maltese Government, was as follows: Yes, 67,607 votes; No, 20,177 votes; Not valid, 2,599 votes (548 H.C. Deb. *263*, February 15, 1956).

On February 26, 1956, during the debate on the Report of the Round Table Conference, the Secretary of State for the Colonies said: " I must . . . state quite categorically that Her Majesty's Government are in favour of the proposals in the Report. This means of all the proposals, including the recommendation for Maltese representation at Westminster," but he added that the Report itself contained conditions (550 H.C. Deb. 1796, March 26, 1956).

On March 28, 1956, the Prime Minister stated that the Government had decided to proceed with legislation in the House of Commons to give effect to the recommendations in the Report but that part of the legislation relating to the representation of Malta in the House of Commons would be brought into operation only if and when the Maltese people had shown their desire for it in a General Election following a dissolution of the Maltese Legislative Assembly. He added that the Prime Minister of Malta had said that he would request the Governor to grant a dissolution (*ibid.*, 2165–2168, March 28, 1956).

**Mauritius**

*Constitutional changes.* The Secretary of State for the Colonies stated that H.M.'s Government proposed the following principal changes: (a) Executive Council. Membership would be increased from nine to twelve of whom seven would be unofficial members elected by the Legislative Council, two would be unofficial members nominated by the Governor and three would be *ex officio* members. The elected element would therefore for the first time be in the majority. The Council would exercise collective executive responsibility (subject to Governor's reserved powers) in contrast with the purely advisory functions of the existing Council. Six unofficial members would be responsible Ministers with portfolios. (b) Legislative Council. Number of elected members would be increased from nineteen to twenty-five and number of nominated members would be a maximum of twelve. The three *ex officio* members would be retained. (c) A Speaker would be appointed for the Legislative Council, the first holder being appointed from outside the Colony. (d) Multi-member constituencies would be retained. (e) Electoral System. The present literacy qualification would be abolished and universal adult suffrage introduced at 1958 General Election. Proportional representation with single transferable vote would replace majority voting. (See 550 H.C. Deb. *25–26*, March 13, 1956.)

**New Zealand**

*Reciprocal agreement.* See NATIONAL INSURANCE, *Benefits* (p. 153, below).

**Nyasaland**

*Governor.* The words " Commander-in-Chief " have been deleted from the style of the Governor of the Nyasaland Protectorate in the Nyasaland Order in Council, 1907, and in the Nyasaland Protectorate (African Trust Land) Order in Council, 1950 (S.I. 1956, Nos. 231, 232).

*Legislative Council.* Three members and one ex-member of the Nyasaland African Congress were among five Africans elected on March 15, 1956, by three African provincial councils to the newly constituted Nyasaland Legislative Council. It is expected that Congress will accelerate its campaign to withdraw Nyasaland from the Central African Federation (*The Times*, March 17, 1956).

See also **Central Africa** (above, p. 177).

**Pakistan**

*Constitution.* A draft Constitution was presented in the Pakistan Constituent Assembly on January 9, 1956. An article on the Constitution will be published shortly in this quarterly.

*Pakistan (Consequential Provision) Act, 1956.* The preamble to this Act, which received the Royal Assent on March 15, 1956, stated that on March 23, 1956, Pakistan was to become a Republic while remaining a member of the Commonwealth. The Act principally provides that all existing law shall have the same operation in relation to Pakistan and to persons and things in any way belonging to or connected with Pakistan as it would have had if Pakistan had not become a Republic. This preserves for Pakistanis the same rights and privileges as they have under the present law and their goods enjoy the same preferential treatment. The provisions of the Act are extended to the law of the United Kingdom, the colonies, protectorate and trust territories with certain reservations in the case of the law of Rhodesia and Nyasaland. (4 & 5 Eliz. 2, c. 31; see also 550 H.C. Deb. 233–260, March 13, 1956; 196 H.L. Deb. 450–452, March 15, 1956.)

*Status.* Pakistan became an Islamic Republic within the Commonwealth on March 23, 1956.

### St. Helena

*Government.* A new Order in Council has been made for the Government of St. Helena and its dependencies (the islands of Ascension, Tristan da Cunha, Gough, Nightingale and Inaccessible). The Order in Council provides, as hitherto, for one person to be Governor and Commander-in-Chief, who is appointed by Commission under Her Majesty's Sign Manual and Signet and holds office during Her Majesty's pleasure. The Governor has powers to appoint a Deputy for short periods when he is absent or ill. An Executive Council and an Advisory Council are constituted in accordance with instructions given to the Governor by Her Majesty. The Governor is empowered to make laws for the peace, order and good government of the territories. Any such law may be disallowed by Her Majesty through a Secretary of State. Subject to any law or Instructions, the Governor may make and execute grants and dispositions of any lands or other immovable property that may be lawfully granted or disposed of by Her Majesty. The Governor has powers of pardon, respite, substitution of a less punishment and remission. The Governor may constitute all such offices as may be lawfully constituted by Her Majesty and may appoint to any office under the Crown except those constituted under Instructions. Subject to any law or Instructions, the Governor may, for cause shown to his satisfaction, dismiss or suspend any such office-holder. The Order provides that all officers, civil and military, and all other inhabitants shall be obedient to the Governor and shall render him such aid and assistance as he may require. Nothing in this Order affects the power of Her Majesty to make laws for the peace, order or good government of the territories (The St. Helena Order in Council, 1956 (S.I. 1956 No. 414, revoking the St. Helena Order in Council, 1939 (S.R. & O. 1939 No. 1925) ) ).

### Sierra Leone

*Status.* The Secretary of State for Colonial Affairs was asked what reply had been given to the all-party deputation in Sierra Leone asking for a new constitution and self-government. The Minister of State for Colonial Affairs replied that the resolution had been presented to him with the request that he bring it to the attention of the Secretary of State for Colonial Affairs and that he had done this (550 H.C. Deb. *202*, March 28, 1956).

### Singapore

*Constitution.* It was agreed that the agenda for the April conference between the Chief Minister (Mr. David Marshall) and the Secretary of State for the Colonies should be (a) a definition of internal self-government; (b) a date for the introduction of internal self-government; (c) the structure of the Legislative Assembly; (d) the future of the Public Service; (e) external relations and external defence; (f) any other business (549 H.C. Deb. *38*, February 22, 1956).

The Singapore Colony (Amendment) Order in Council, 1956, has amended the Singapore Colony Order in Council, 1955 (S.I. 1955, No. 187) by increasing the number of appointed Ministers from six to seven, by enabling the Governor to appoint an appointed Minister instead of an *ex officio* Minister to preside over the Council of Ministers in his absence and by revoking section 55 which provides that the official language of the Assembly shall be English (S.I. 1956, No. 233).

### Somaliland

*Constitutional position.* The Protectorate is administered by the Governor who has the power to make Ordinances. There is no Executive or Legislative Council. There is an Advisory Council of representative Somalis which meets to discuss Protectorate affairs. New constitutional forms are now required, in the opinion of H.M.'s Government, to enable the Somali people to play a greater part in the conduct of their own affairs. In February, 1955, Orders in Council were made providing for the establishment of Legislative and Executive

Councils. The Legislative Council will consist of the Governor as Resident, not more than eight officials and not more than six unofficial members. The Executive Council is to consist entirely of official members for the time being.

*Financial position.* Since 1948 when the Colonial Office resumed responsibility for the administration of the Protectorate, H.M.'s Government has provided grants-in-aid averaging over 50 per cent. of the total territorial expenditure. It is now intended in accordance with details set out in the White Paper referred to below to establish a new system of financial control which, while enabling the safeguards provided by the ordinary procedure to continue unimpaired, will convey to the Somali members of the new Legislative Council some effective responsibility for financial matters. This system will be complementary to the new constitutional arrangements and will, in the opinion of H.M.'s Government, give reality to the authority of the Legislative Council, provide its unofficial members with experience and a sense of responsibility in financial affairs and, it is hoped, lead to an expansion of local revenue. It is the intention that the new financial arrangements should be introduced for the financial year 1956–1957 (Grants-in-Aid of the Administration of the Somaliland Protectorate: Arrangements for financial control (Cmd. 9666) ).

### South Africa

*Constitution.* The South African Act Amendment Act, which received its first reading by 170 votes to 65 on February 13, 1956, was promulgated in the Government *Gazette*, on March 2, 1956. The Act revalidates the Separate Representation of Voters Act, 1951, deletes the provision in the South Africa Act entrenching the franchise rights against amendment on grounds of race or colour, but leaves untouched the entrenchment of equal language rights. The Act provides that " no court of law shall be competent to pronounce upon the validity of any law passed by Parliament other than a law which alters or repeals or purports to alter or repeal " provisions for equal language rights and their entrenchment.

The validity of the Act is being contested in the courts (*The Times*, February 4 and 15 and March 3, 1956).

### Togoland

*Elections.* The Plebiscite Administrator for Togoland has been empowered to declare invalid the results of the voting in particular Wards of a District (The Togoland under United Kingdom Trusteeship (Plebiscite) (Amendment) Order in Council, 1956 (S.I. 1956 No. 416) amending S.I. 1955 No. 1956).

### Trinidad and Tobago

*Constitution.* The Trinidad Government published on February 12, 1956, proposals which the Secretary of State for the Colonies, with certain minor amendments, had approved. The principal recommendations are: the creation of a Chief Minister, to be elected by the Legislative Council, who will be the Leader of the Government in both the Legislative and the Executive Councils; the replacement of the Financial Secretary by an elected Minister of Finance; the removal of the nominated member from the Executive Council and the addition of one other elected member, making a total of eight elected and two *ex officio* members on the Executive Council. In the Legislative Council there will be an elected Speaker and twenty-four instead of eighteen elected members, together with the present two *ex officio* members and five nominated unofficial members (Commonwealth Survey, C.O.I., February 21, 1956).

In order to proceed with the preliminaries necessary for establishment of the new Legislative Council for Trinidad and Tobago the legislature of the Colony is empowered to make provision for the election of the twenty-four members and for the registration of electors (The Trinidad and Tobago (Electoral Provisions) Order in Council, 1956 (S.I. 1956 No. 415) ).

See also **British Caribbean** (p. 176, above).

**Uganda**

*Buganda representatives.* A Committee has been set up by the Buganda Government to study methods of introducing direct elections for the Buganda representatives in the Uganda Legislative Council. This is in preparation for the joint review which, under the Buganda Agreement of last year, H.M.'s Government have undertaken to arrange in 1957. The committee consists of the Minister of Education in the Buganda Government as chairman and four other members (549 H.C. Deb. 1173, February 29, 1956).

**Zanzibar**

*Constitutional proposals.* In April, 1954, Sir John Rankine (the former British Resident) informed H.M.'s Government that he had secured the agreement of the representatives of all communities on the Legislative Council to the measures of reform he had put to them. Briefly these provided for the appointment of local people to the Executive Council, for their increased representation in an enlarged legislature and for the formation of a Privy Council of official and unofficial members to advise His Highness the Sultan. Subsequently Mr. W. F. Coutts was appointed to investigate the most suitable method of choosing the unofficial members of the Legislative Council. The Arab community refused to meet Mr. Coutts. Since the publication of Mr. Coutts's Report which is being considered by the Sultan's Government, the Arab leaders have agreed to resume co-operation with the Government. (548 H.C. Deb. 1305–1314, February 3, 1956; 549 H.C. Deb. 1170–1172, February 29, 1956; 550 H.C. Deb. 1243–1244, March 21, 1956.)

In his Report, Mr. Coutts recommends that of the twelve unofficial members, six should be elected and six should be filled from racial groups in a proportion which the Government considers suitable. Nominated members would be chosen by the racial communities.

An elector should be aged twenty-five and literate, or aged forty-five. Female suffrage should be considered after three years. An elector must also have one of six property or service qualifications (*The Times*, March 10, 1956).

# BOOK REVIEWS

The United Kingdom. The Development of its Laws and Constitutions. Part I (England and Wales, Northern Ireland, The Isle of Man). By George W. Keeton, M.A., LL.D., and Dennis Lloyd, M.A., LL.B., and Specialist Contributors. [London: Stevens and Sons. 1955. xiv and 523 pp. £3 3s.]

This book is the first Part (Scotland and the Channel Islands receive separate treatment) of Vol. I in the valuable British Commonwealth Series produced under the General Editorship of Professor Keeton. The latter, in his Preface, indicates that difficulties were met with in the preparation of this volume and these doubtless account for the fact that it has appeared some time later than several others in the series. This, however, has its advantages. Since these other volumes have considered the development of the law of Commonwealth countries in relation to developments of similar branches of law in England, the present editors have been helped to gauge what sort of treatment of the English material is best suited to the purposes of the series as a whole. Wisely they have decided to make their account as comprehensive as possible, but to avoid writing either an institutional treatise or a volume of modern legal history. Rather they have sought to survey the most important developments and trends in each branch of the law and the major problems which have arisen. The result is neither an Everyman's Own Lawyer nor a potted Halsbury, but rather a picture, painted in broad strokes, of the present state of English law. It may be surmised that it will prove particularly useful to students in other parts of the Commonwealth and in foreign countries who want to obtain a general impression of our system.

In stating that this book pictures the *present* state of our law, it is necessary to make one qualification. The book seems to have taken an unconscionable time to pass through the Press. Internal evidence suggests that most of the contributions were written in 1952 and 1953, whereas publication date was November, 1955. With varying success the contributors have made revisions up to some date in 1954—exactly what date we are not told and it is impossible to tell. Hence, the book was at least a year out of date before it appeared. Little effort seems to have been made to revise the references to cases of 1952 onwards so as to convert W.L.R. and All E.R. to L.R.; and no great care seems to have been taken to check the names of cases, many of which are misspelt. Happily these faults are of minor importance in a book which deals with general trends rather than with details.

More serious is the failure of certain contributors to avoid polemics and to strive for objectivity in their comments on present-day trends. This is particularly unfortunate in a book which will be relied on by foreign readers. And unhappily this failure is especially noticeable in the contributions on public and property law where restraint is particularly needed. A few examples must suffice.

After a somewhat sour account of delegated legislation, we are told (at p. 48) that: " If the volume of criticism against delegated legislation came from interested parties it might be suspect, but no one can fail to be concerned when a Lord Chief Justice characterises the system as despotic, and academic lawyers join with him by condemning it in books and articles." The " academic lawyers " who are quoted as joining Lord Hewart are Allen, Keeton, Seighart, Schwartz and Carr. None of these writers can fairly be accused of doing anything so foolish as " condemning " such legislation, and to ascribe these views to Sir Cecil Carr is astonishing. No one reading these pages will guess that Hewart's extreme views were rejected by the Donoughmore–Scott Report, which is quoted only when it criticises and ignored when it exculpates.[1] And no one is given a chance to turn to the Clement Davies Report, which in 1953 gave delegated legislation a more-or-less clean bill of health, since it is never referred to—perhaps because the Report appeared after this contribution was written. And no one will guess from the references to the growth of delegated legislation that its volume is in fact decreasing rapidly (the annual number of general statutory instruments being now less than half what it was in 1949).

Distaste for bureaucracy is coupled with an exaggerated respect for the legal profession. One manifestation of this is the statement, already quoted, that "no one can fail to be concerned" by the declarations of a Lord Chief Justice; in fact lots of people have failed to be concerned by such declarations —indeed, the whole history of penal reform in this country might be summed up as the refusal to be alarmed thereby. Another is the statement (at p. 9) that "the completion and conception of law reform invariably comes from lawyers rather than laymen." Even if we limit "reform" to what the learned contributor would recognise as deserving that description, it is difficult to reconcile his statement with the tributes which he himself pays to Bentham (p. 101) and to the Church of England Temperance Society (p. 120). If only he had been content to say "often" instead of "invariably" this statement might be justified; as it stands it is nonsense.

Turning to Criminal Law we still find the same gloomy view of modern trends. The ending of the chapter is characteristic. "This [*i.e.*, the growth of statutory offences] is simply one aspect of the drift towards collectivism, which is the outstanding characteristic of the present age, and its further manifestations can only be awaited with anxiety." Lest this should lead overseas readers to believe that the whole of the English profession suffers from acute anxiety neurosis, let me assure them that most of us face the future with optimism and confidence.

Even the less controversial field of property law is viewed with the same jaundiced eyes. The Town and Country Planning Act carries planning "to the point of absurdity" and represents "a strong drift towards state feudalism" (p. 136). Indeed, "today little remains of land ownership but the name"[2] (*ibid.*). Exaggerations of this sort would be harmless and amusing in a book intended solely for home consumption, but in one designed for export they are inexcusable. Suggestions that we are on the way to becoming a race of property-less collectivised serfs can only dismay our friends and give aid and comfort to those who argue that we are no better than Communists and as such unworthy and unreliable allies.

It would, however, be misleading and unfair to imply that the whole of the contributions on these subjects is marred by these faults of exaggeration. On the contrary, except when their hobby-horses run away with them, the learned contributors have done a commendable job of explaining in brief compass the outstanding developments in our public and property law. My only other major criticism is that the account of constitutional and administrative law seemed excessively analytical for a work of this sort (with too much talk of "norms") and insufficiently descriptive. On more minor matters it seems somewhat misleading in fact, however true in law, to describe the Special Commissioners of Income Tax as a tribunal composed of professional administrators (p. 85). Nor is it correct, though some wish it were, to state (p. 106) that "wrong" in the McNaghten Rules means "morally wrong"

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[1] At p. 89 the Report is said to represent "the high-water mark of criticism and agitation against the activities of the executive in the field of judicial decision." In one sense this is true enough, but not, as the statement suggests, because the Report subscribed to the criticisms and agitation and thus "served to clear the air" (*ibid.*), but because, in the main, it rejected them. In fairness, however, it should be said that in general the account of administrative tribunals (at pp. 84–98) is much more balanced and fair than that of delegated legislation.

[2] And, "Even of that the owner may be deprived under the Act" because of the wider powers of compulsory acquisition (*ibid.*).

(*R.* v. *Windle* [1952] 2 Q.B. 826). The chapter on Property Law shows signs of hasty writing and inadequate revision; there are a number of clumsy sentences and two that are (to me) incomprehensible.[3] The statement of *Reading* v. *Att.-Gen.* (at p. 150) implies that the soldier's ill-gotten gains were subject to a constructive trust because they were obtained in violation of the Egyptian revenue laws [4]; in fact, of course, the trust arose because the soldier had abused his position in relation to the British Crown.

Happily, the chapters by the other contributors are wholly free from exaggeration or bias. Those by Professor Dennis Lloyd (one of the co-Editors) on Precedent, Legislation and Codification (Chap. 2), Landlord and Tenant (Chap. 7), Family Law (Chap. 8), Contract and Quasi-Contract (Chap. 9), Tort (Chap. 12), Civil Courts, Procedure and Pleading (Chap. 13) and Evidence (Chap. 14), seem to me to be models of concise, accurate, and stimulating writing. Professor Lloyd does not eschew criticism (on the contrary) but he is always balanced and objective and all these chapters can be read with pleasure, profit and confidence. Especially commendable is the emphasis placed on Procedure—a topic of exceptional practical importance all too often ignored in academic legal literature. It seems regrettable that there is no similar account of the criminal courts and of criminal procedure; the arrangement of the book would have been greatly improved had both civil and criminal courts and procedure been dealt with together in an early chapter. It is not Professor Lloyd's fault that he, dealing with some of the fastest-moving branches of the law, is particularly hard hit by the delay in publication. He has, indeed, made a determined effort to revise his text [5] and has added references to most of the appropriate legislation and case law of 1954.

I thought, with respect, that the least successful of Professor Lloyd's chapters was that on Mercantile Law (Chap. 10). This gives the impression that there has been little or no growth since the codifying statutes at the end of the last century. This I believe to be misleading; some description, for example, of Banker's Documentary Credits would surely have been appropriate? And at p. 236 it is erroneously stated (on the basis of a mis-reading of *Drury* v. *Buckland* [1941] 1 All E.R. 269) that there is no implied condition of merchantable quality in hire-purchase agreement (but see *Felston Tile Co.* v. *Winget* [1936] 3 All E.R. 473, C.A.; *Drury* v. *Buckland* merely establishes that the hirer cannot sue the dealer (not a party to the contract) on an implied term).

The chapter on Company Law (Chap. 11) is written by Professors Keeton and Newark. I had expected some interesting observations on the role of the company in the Welfare State and I turned to this chapter with eagerness—and some misgivings. My expectations were unfulfilled. The section headed " Recent Problems " proved to be unexpectedly tame, with no reference to such live issues as dividend limitation, managerial responsibility to the community, or take-over bids. Nor could I find, here or elsewhere, any reference to the floating charge—perhaps England's most significant contribution to the problem of corporate finance. The chapter is, however, an able summary of some of the major provisions of the Companies Act—almost giving the impression that the authors regard this as a corporate code,[6] instead of a consolidation of legislation which is far from all-embracing. At p. 262 it is erroneously stated that the so-called Bubble Act resulted from the bursting of the South Sea Bubble; in fact the Act preceded the burst and may have contributed towards the pressures which induced it. At p. 266 there should be a reference to section 12 of the Prevention of Fraud Act, 1939, for it is under this section, rather than under section 44 of the Companies Act, that prosecutions are now brought for misleading prospectuses. And it is quite untrue to state (*ibid.*) that house-to-house share-hawking is tolerated in Canada; it is in fact expressly forbidden by the Canadian Companies Act (Rev. Stat. 1952, c. 53), s. 82, the Ontario Securities Act (Rev. Stat. 1950, c. 351), s. 52, and the Quebec Securities Act (Rev. Stat. 1941, c. 282), s. 35, as amended in 1947 by 11 Geo. 6, c. 66, s. 6.

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[3] " Optional registration is possible in other areas if the owner wishes. Another practice of voluntary registration is steadily growing " (p. 132). Should the second sentence read: " and the practice . . ." ?

" This important change was introduced with the convertibility of land into investments whenever a settlement of land existed in contemplation " (p. 133). I cannot make sense of this anyhow.

And " trusts infringing perpetuities " (p. 139n.) is not a happy phrase.

[4] At p. 248, Professor Lloyd says the payments were bribes from local drug-smugglers. To the best of my recollection the reports nowhere specify the exact nature of the nefarious enterprise.

[5] But Mr. Sales's article on " Standard Form Contracts " appeared in 16 M.L.R., not L.Q.R. as stated in note 10 at p. 212.

[6] This, indeed, is stated by Professor Newark at p. 12. But *cf.* Professor Lloyd at p. 35.

The remaining chapters on the Welfare State—Nationalised Industries (Chap. 16) and The Social Services (Chap. 17)—are written by Mr. L. A. Sheridan with admirable objectivity and accuracy. Unhappily he has been forced to deal with them so briefly that the foreign reader is unlikely to obtain much idea of their actual functioning. To describe, as Mr. Sheridan does, all the existing nationalised bodies (from the Post Office to the Atomic Energy Commission and the I.T.A.) in fifteen pages is no mean feat; he triumphantly accomplishes it, but has little scope for criticism or comment. The same applies to the description of the National Insurance and National Health Schemes. I wished that he could have corrected some of the misconceptions (many of which have been deliberately fostered by interested pressure groups) which are prevalent abroad—*e.g.*, the conviction, firmly held in many quarters, that the patient has no choice of G.P.

Mr. Sheridan is also responsible for the section on Northern Ireland (Chaps. 18–20). By concentrating on the major contrasts with English law he allows himself more scope for comment and I personally found these chapters among the most interesting in the book. The final chapter, on the Isle of Man, is by Mr. D. C. Holland, who contributes a most valuable account of a too-little-known jurisdiction.

To sum up: this volume may be greeted with modified rapture. Parts of it are excellent and, with the exercise of a little more care and much more restraint, all of it could have been very good. My criticisms should not be allowed to conceal the fact that the learned editors were faced with a task of immense difficulty which, on the whole, they have accomplished with great skill. The book is very well produced and the price no higher than we have learnt to expect. L. C. B. GOWER.

BRITISH GOVERNMENT INSPECTION AS A DYNAMIC PROCESS. By JOHN S. HARRIS. [Stevens & Sons Ltd. pp. xii and 196. 25s.]

THE system of a central authority supervising the activities of local authorities by means of inspectors was first adopted in England in the Poor Law Amendment Act of 1834, under which the Poor Law Commissioners appointed a number of Assistant Commissioners, whose function was to inform the Commissioners what was happening in the Unions, and to advise the Guardians on the best means of performing their functions. Since then the system has been copied in a number of other fields, most important of which are Education, Public Health, and Police. These inspectors are not endowed with authority to give orders to the local authorities they visit, but merely authorised to advise and to report. They cannot be properly regarded therefore as a means by which the Ministries exercise control over the local authorities, but rather as a part of the mechanism by which the Ministries know when control needs to be exercised.

Dr. John S. Harris, of Wayne University, has made a careful and detailed study of the history and functions of the Inspectors employed by the various Government Departments, and in this book he presents the results of his researches, and the evidence on which he bases the claim that " the characteristic bond between the English central and local governments has been the 'principle of inspectability.' Although other methods of control have been utilised by the departments in London, the inspection process remains unquestionably the central government's most effective control device."

In compiling his book Dr. John Harris has relied to a very great extent on the official publications of the Ministries concerned. This can, however, result only in a partial picture of the situation. Any form of supervision has two aspects; when viewed from above, and from below; the schoolmaster conscientiously attempts to guide and advise his pupils; to the schoolboy this too often seems like interference, based on a false assumption of superior wisdom. So it is with " inspectability "; the Ministry sees it as a process of wise help and guidance; the local authority sees the wide variation between one inspector and another; most of them helpful and encouraging, but a few of them a nuisance. Some Directors of Education complain that there is a tendency towards less help and guidance, and more fussing about administrative detail. Nor would those who see inspection from the viewpoint of the inspected accept the view that greater wisdom is necessarily to be found in Whitehall than in the Town Hall or County Hall. The history of English social services shows that the impetus to progress has come at least as often from individual authorities as from the central government. So also in technical matters the local authorities sometimes feel that they are competent to perform their functions without detailed supervision through Inspectors or Regional Officers. For example, housing authorities usually employ competent and qualified architects, and sometimes wonder whether it is really necessary for the Ministry of Housing and Local Government to employ more than ninety architects to supervise their work. Nearly every local government officer would agree with the view that the Inspectors have on the whole been helpful and tactful advisers, who have done much to improve local services, but it is doubtful whether many of them would accept without qualification Dr. Harris's whole-hearted enthusiasm for the system. Still less would they agree with his arguments in favour of central control in general. There is much to be said on the side of local initiative and freedom, and Dr. Harris's book would have been more complete if he had studied the subject a bit more from the angle of the local authority, and not so predominantly from the viewpoint of the Ministries.

The inspectors with whom the writer is concerned are those who visit and advise the local authorities, and report to the Ministries on what they have seen. Of these he gives a full account, and has collected many examples. It is therefore strange that he should have omitted all reference to one important group—the Home Office inspectors under the Children Act, 1948. On the other hand it is perhaps confusing to include those inspectors who conduct local Inquiries into the designation of New Towns or hear appeals against compulsory purchase orders. Whether their function be strictly quasi-judicial or not, it is clearly very different from that of H.M. Inspectors of Schools or H.M. Inspectors of Constabulary.

Dr. Harris recognises and admits the difficulty of evaluating the influence of the inspectors in the development of English local government and the services which it provides. This question is inevitably linked closely with the whole problem of central control, which lies beyond the scope of this work. It is clear that the system as a whole has served its purpose well, and that local authorities do in general provide efficient service. How far this is due to the presence of H.M. Inspectors no one can say, but Dr. Harris is prepared to give them much of the credit, as the title of his book implies.

Whether one agrees with his premises and his conclusions or not, there can be no doubt that this book will serve a valuable purpose as a collection of information about how the system of inspection works, and how the Inspectorate is organised. Dr. Harris has performed a useful service in collecting the relevant facts and presenting them in this form.

B. KEITH LUCAS.

# PUBLIC LAW

*Autumn, 1956*

## COMMENT

ONCE upon a time there was a judge who accused criminals from the bench, not so much of their obvious legal crimes, but of " monstrous egoism, lack of humour, and morbidity deliberately encouraged." He went further: " Things came to a head in that celebrated diamond case in which the Prime Minister himself, that brilliant patrician, had to come forward, gracefully and reluctantly, to give evidence against his valet. After the detailed life of the household had been thoroughly exhibited, the judge requested the Premier again to step forward, which he did with quiet dignity. The judge then said, in a sudden, grating voice: ' Get a new soul. That thing's not fit for a dog. Get a new soul.' " The judge who took this somewhat broad view of his functions was fictitious, but the Statement on the Findings of the Conference of Privy Councillors on Security might, with one fundamental difference, have had him in mind. " There is a duty on Departments," says the Statement, " to inform themselves of serious failings such as drunkenness, addiction to drugs, homosexuality or any loose living that may seriously affect a man's reliability. . . . Nothing could be worse than to encourage tale-bearing or malicious gossip. Nevertheless, it is important to impress not only on Heads of Departments but on supervisory officers generally . . . that they must not fail to report anything which affects security. This covers . . . serious defects or failings which might jeopardise the security of the section of the public service in their charge. . . . A serious defect may appropriately be the determining factor in a decision to dismiss a particular individual or to transfer him to other work."

The fundamental difference between Chesterton's judge and the group of Privy Councillors is that the former was operating in a public court and relied for his assessment of character on evidence produced there before him. Once again, proper procedure appears as the strong shield against suspicion. " The Conference recognises," says the Statement, " that some of the measures which the State is driven to take to protect its security are in some respects alien to our traditional practices. Thus, in order not to imperil sources of information, decisions have sometimes to be taken without revealing full details of the supporting evidence. Again, it is sometimes necessary to refuse to employ a man on secret duties, or, in those cases where no alternative work can be found for him in the public service, to refuse to employ him at all, because after the fullest investigation doubts about his reliability remain, even although nothing may have been proved against him on standards which would be accepted in a Court of Law." Clearly, the ultimate decision whether a particular person should be dismissed or transferred must be taken by the Government because theirs is the responsibility. But the great danger is that injustice will be done if the grounds for suspicion are not made known to that person in such a way and in such a place that he can seek to deny their validity. Much can be done without imperilling sources of information; no one is asking for " full details of the supporting evidence." But it is essential that the " accused " should know on what grounds he is alleged to be a security risk. There does seem to have been a change on this point. In the debate in the House of Lords on June 21, 1956, on the dismissal of Mr. Lang (see below, p. 255), Viscount Stansgate recalled that the then Prime Minister had said in 1948: " The first thing to be done is to see that the civil servant concerned should be informed. He should not merely be informed that he is suspected, but should be given, as far as possible, chapter and verse, saying, ' You are a member of this organisation; you did this or that; can you explain it? ' "

It does not appear that in Mr. Lang's case this procedure was followed. In the House of Commons on June 11, 1956, the Minister of Supply said: " I am not prepared, for reasons the House will appreciate, to make public the information available to Her Majesty's Government. But I can say that Her Majesty's Government have followed the recommendations of the Conference of Privy Councillors on Security. Mrs. Lang's political associations were one of a number of matters taken into consideration." In the House of Lords on June 21, 1956, Lord Chorley said that Mr. and Mrs. Lang and two friends who were solicitors of standing were interviewed, each separately, by Sir Cyril Musgrave at the Ministry and that each came away from the interviews with the distinct impression that Mrs. Lang's ex-association with the Communist Party was the only substantial matter which the Ministry had against Mr. Lang; and that the two friends said that no other point was put to them. Lord Chorley said that the Minister " steadfastly refused to divulge, either to Parliament or to Mr. Lang—or, so far as I know, to anyone else " what were the other matters.

The existing procedure provides for a right of appeal to the Three

Advisers. In the House of Lords debate, referred to, the Lord Chancellor said that their function was to advise the Minister as to the extent or degree of Communist association. He put it thus: "Take the case of a civil servant. It has been decided that he is a security risk. He controverts that—in some cases he does not; but assuming he does, he appeals to the Three Advisers. The Minister then has put before him the Three Advisers' assessment of the rightness or wrongness of the degree of association alleged against the man." Viscount Stansgate interrupted to ask who had decided that the man was a security risk. The Lord Chancellor replied: "It has been decided by the Minister." Viscount Stansgate asked: "Has the evidence come before the Minister first and has he assessed it and said, 'I think this man is a security risk'? And can the man then appeal to the advisers? Is that the position?" The Lord Chancellor replied: "That is the position."

This "position" seems to be unnecessarily weighted against the individual. The Minister takes a decision which, if no appeal is made, is final. He is not, apparently, saying merely that there appears to be a case for investigation. It is disturbing to find that in a matter of such importance the order of events should be, first, judgment without hearing, then hearing and then reconsideration of judgment.

An alternative procedure may be suggested. The events would start with the accumulation of evidence against the individual. At a certain point, those investigating would decide that this evidence was sufficiently strong to make necessary a report to the Minister. The Minister would then refer the report for investigation to some other body. This body would inform the individual on what grounds it was alleged that he was a security risk; this need not involve "sources of information." The individual should then be entitled to appear before the body, legally represented if he wishes, and seek to controvert the allegations by giving his explanation of the actions complained of and by calling witnesses as to his character and behaviour. On balance, it would seem desirable that this hearing should be in public if the individual concerned so chooses. The body should then advise the Minister who would, for the first time, draw his own conclusions and decide his action. Who should compose this investigating body? We suggest a group of three persons, being two persons of the kind which form the Three Advisers, presided over by a judge of the High Court. Such a procedure would do much to ensure that the accusations were explicitly founded and that proper opportunity was given to the individual to answer them. Those responsible for security might think that their work would be somewhat hampered by this method. And they might be right. But "national security" (a phrase which masks an infinite number of gradations of meaning) must, like other forms of State activity, be less efficient than it could be in the interests of individual justice.

Two cases of more than usual importance were reported in the second quarter of this year. The decision of the House of Lords in *Smith* v. *East Elloe R.D.C.* is discussed in the article by Mr. de Smith. *Inland Revenue Commissioners* v. *Hambrook* (see p. 253, below) having only recently gone to the Court of Appeal detailed comment has been postponed. The Lord Chief Justice, in a most learned judgment at first instance, examined afresh the basis of Crown service and seemed to push a little wider the door opened by Lord Atkin in *Reilly* v. *The King* in 1934. We seem to be coming nearer to the view, advocated by Professor J. D. B. Mitchell and others, that the Crown's power to dismiss its servants need not mean that a legal right to compensation is inevitably barred.

Special attention should be called to the Report of the Select Committee on Estimates on the Legal Aid Scheme (summarised below on p. 250); to the publications of the Committee on Administrative Tribunals and Enquiries (below, p. 280); to the proposed new terms of reference for the Select Committee on Nationalised Industries (below, p. 270) the debate on which has, as we write, been postponed; and to the report of the Singapore Constitutional Conference (below, p. 287).

This second issue of *Public Law* is distinguished (as was the first) by articles from writers of authority on their subjects. Sir Cecil Carr and Mr. de Smith will forgive us if we welcome particularly the first contribution to our pages from Professor Jaffe of Harvard Law School. We hope we shall be able to persuade him to write for us on many occasions in the future on questions as instructive to our own system of law as the working of the Administrative Procedure Act.

## A Note from Australia

*Constitutional Law.* In 1955, the High Court of Australia dealt with the series of State Acts passed in an endeavour to comply with the view of section 92 of the federal Constitution (guaranteeing freedom of trade and intercourse between the States) adopted by the Privy Council in *Hughes and Vale* v. *New South Wales* [1955] A.C. 241. The Privy Council decision and the seven subsequent High Court transport decisions, beginning with *Hughes and Vale* v. *N.S.W.* (*No.* 2) (with two other section 92 cases) are reported together in 93 C.L.R. pp. 1–316. The Privy Council had held, directly or inferentially, that the transport control legislation of the mainland States, enforced by them since 1930–

1931, had no valid application to interstate hauliers, notwithstanding decisions of the High Court and dicta of the Privy Council itself to the contrary during the intervening years. The High Court then held invalid, as to interstate haulage, the amending Acts by which four mainland States endeavoured to fit their regulations into the concept of freedom adumbrated by the Board, while retaining a considerable degree of discretionary control and special taxation. The context and history of section 92 indicate that it was concerned to prevent the fiscal policy of " protection " from being enforced between States; the Board and the High Court have now between them expanded the section into a substantive due process clause with a logic whose major premise (left unstated by the courts, but clearly stated in the arguments of Sir Garfield Barwick, Q.C., whose advocacy has had much to do with these developments) is a conception of freedom drawn from the sociology of Herbert Spencer; this will invalidate regulation, having no " protective " content. Earlier High Court decisions show a tendency to confine the scope of the " interstate trade " so powerfully defended against collectivist policy within narrow bounds. Probably the latter doctrines would have provided an answer to the appellants in *Ex p. Transport Publishing Co. Pty., Ltd.* [1955] Q.L.R., who relied, *inter alia,* on section 92 when seeking to quash orders of the Queensland Literature Board of Review, made under the Objectionable Literature Act, 1954. But the late Macrossan C.J. and Mansfield S.P.J. also suggested that section 92 does not affect such police-power regulations; this is a feature of the " new direction " in section 92 interpretation which the High Court still has to work out.

In *O'Sullivan* v. *Noarlunga Meat, Ltd.* (1955) Argus L.R. 223, the High Court refused a certificate of appeal to the Privy Council under section 74 of the Constitution; the applicant had already secured leave to appeal from the Board, on condition that any questions as to " the limits *inter se* of the constitutional powers of the Commonwealth and the States " should be excluded unless the necessary certificate of the High Court under section 74 were obtained. The case on which leave was sought mainly concerns the scope and application of section 109 of the Constitution, under which federal law overrides " inconsistent " State law; the High Court has consistently held that such issues do not involve an " *inter se* " question, since inconsistency becomes relevant only if it is conceded that both the federal and the State law in question are otherwise valid. The court repeated the grounds on which it has since 1913 always refused certificates of appeal—" federalism is a form of government the nature of which is seldom adequately understood in all its bearings by those whose fortune it is to live under a unitary system." While this may be so, it seems undesirable that the Privy Council should be admitted interstitially to pass upon features of the system which are very federal and extremely important—such as the application of sections 92 and 109—merely because on the very involved interpretation of section 74 these are regarded as not "*inter se*"—especially if the Board's hearing is rendered artificial by its inability to consider the whole case, because of the absence of a certificate for the *inter se* issues. The High Court indicated that while the specific question "is State Law A inconsistent with Commonwealth Law B" might not be a question *inter se*, the more general issue "what is the meaning of inconsistency under section 109" might be so; if the Board agrees with this, the scope of the permissible appeal in the instant case will be small. But it would seem preferable for the Commonwealth Parliament to abolish the appeal to London, or else for the High Court to make a more flexible use of its certifying powers, so as to prevent such exhibitions as the *Bank Nationalisation Case* [1950] A.C. 235, where the interpretation of section 92 was materially influenced by a Privy Council opinion given strictly speaking without jurisdiction and on a very incomplete view of the relevant facts.

In *Ross Chenoweth, Ltd.* v. *Hayes* (1955) S.A.S.R. 66, the Supreme Court of South Australia considered some general questions of the "rule of law." Sections 674–677 of the State *Local Government Act* provided that if a by-law is certified as valid by the Crown Solicitor (a permanent public servant), or on his refusal to certify by a judge, and is thereafter laid before the Houses and not disallowed, and is then confirmed by the Governor-in-Council, it shall "have the force of law." The court held that these sections operated to prevent the judiciary from treating the by-law as *ultra vires*, even though (as in this case) it was plain that the by-law had been wrongly certified, being beyond the powers granted by the Act under which it had been made (in this case the State *Building Act*). It was argued that on such a view, Parliament had unconstitutionally "endowed with its own capacity a new legislative power not created by the Act to which it owes its own existence." The court was attracted by this argument, which in one form or another has been raised from time to time to suggest limitations upon the delegating power of Australian legislatures. But the delegating power is clearly very wide, and in the end the justices declined to treat the *Local Government Act* sections as invalid, and contended themselves with strong criticisms of their policy—"unwarranted usurpation of power," "the process of our court is used for the purpose of oppression under the colour of a legal judgment," "by accident or design the *Local Government Act* has rejected the British tradition of the rule of law," etc. To this writing, the judicial criticisms had made no impact on the legislature. The laity are apt to be more tolerant than the lawyers of provisions intended to short-circuit expensive litigation on questions of " *vires*," an attitude partly explained by such cases as *R.* v. *City of Moorabbin* (1955) V.L.R. 142.

*Administrative Law.* The perennial, and unnecessary, problem of the relation of statutory corporations to the Crown divided the High Court 3-2 in *Wynyard Investments Pty. Ltd.* v. *Commissioner for Railways* (N.S.W.) (1955) Argus L.R. 49. The majority held that the Commissioner was entitled to the Crown's immunity from the operation of legislation restricting the rights of landlords; they relied on an express provision in the N.S.W. *Transport* (*Division of Functions*) *Act* that " for the purposes of any Act " the Commissioner should be a " statutory body representing the Crown." The attempt of the dissentients to cut down these expressions is entertaining, but with respect not convincing. But in any event, unless the older agency test of " shield of the Crown " is formally abandoned, it would seem that the case was also concluded by another provision of the same Act that in exercising his " powers, authorities, duties and functions," the Commissioner should be subject to the " control and direction of the Minister." If this did not make the Commissioner an agency of the Crown, what would? The difficulties of the subject are great enough without abandoning the few tests which will lead to reasonably certain results.

G. S.

# PARLIAMENTARY CONTROL OF DELEGATED LEGISLATION

## SIR CECIL CARR, Q.C.

SETTING out once more on a now familiar trail, might we, while we are still fresh, begin by giving chase to a brace of red herrings? It seems high time that the two of them should be (however inharmonious the metaphors) run to earth and put finally to sleep.

The first is the notion that there is an annual leap upward in the output of " subordinate " or " delegated " legislation, a progressive increase in those Orders in Council, departmental rules and regulations and so on, which we used to know as " Statutory Rules and Orders " and now call by the more comprehensive name of " Statutory Instruments." Two distinguished American professors, for instance, in an admirable and authoritative book on administrative law published two years ago, ended their reference to the " Scrutiny Committee " of our House of Commons with this sentence: —

> " There are doubts whether the committee will be able to continue effectively to discharge its functions, for the number of statutory instruments is constantly mounting." [1]

If there were in fact a constant increase, there would be all the more reason for reconsidering the methods of parliamentary control. But the numbers are falling, not rising. When Britain suffers from a World War, we have to swallow heavy doses of drastic regulations and orders. It is part of the medicine prescribed for national survival. But, sooner or later—probably later rather than sooner—the flood of subordinate legislation recedes. A witness offered that observation in 1930 to the Committee on Ministers' Powers, familiarly known as the Donoughmore, or (more justly) the Donoughmore-Scott, Committee [2]; he pointed out that the annual total of Statutory Rules and Orders officially registered in 1929 was about half the total registered in 1920. More recent statistics show a similar trend. When registered, the instruments are officially classified as either " general " or " local "; it is the general rather than the local class which is likely to affect life, liberty and the pursuit of happiness and, therefore, to need parliamentary supervision. In spite of occasional setbacks there has been a steady decrease since 1947 in the full annual totals; and, if one

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[*] This article in substance reproduces a lecture delivered at London University on February 14, 1956.

[1] *Administrative Law, Comments and Cases*, Gellhorn and Byse (1954), p. 157.

[2] *Committee on Ministers' Powers, Memoranda and Evidence*, Vol. 2, p. 204.

takes the figures for the "general" instruments, the progressive decline is conspicuous, the figure for 1955 being less than half the corresponding figure for 1949.[3] Somehow this topic stimulates a quite unconscious exaggeration. A distinguished ex-Cabinet Minister apparently told a Select Committee of the House of Commons in 1953 that there were 400 Statutory Instruments for supervision by the House on the day on which he was speaking.[4] That figure surprised Mr. Herbert Morrison to whom it was put, and it has surprised others; an independent check put it no higher than 71. Whatever the arithmetic, the tide is falling.

If then, with apology for repeating the confusion of metaphor, our first red herring has been nailed to the counter, the second is this; perhaps it came out of Lord Hewart's larder in 1929. The Donoughmore-Scott Committee's report ought to have killed it stone dead in 1932, but its ghost has gone on walking. It is the notion that a great deal of delegated legislation is the handiwork of a few obscure and irresponsible civil servants who frame orders and regulations just to beguile the tedium of their prolonged periods of idleness and with no attempt to let their Minister know. The anonymous witness already mentioned had the hardihood to dangle this notion in front of the 1953 Select Committee and to add that he supposed he need not bother to repudiate it.[5] Fortunately, the Select Committee gave chase in full cry. Some of its members had heard stories of the ghost; if the story was false, it was worth while to reassure the public. The committee took evidence from all the major, and some of the minor, rule-making departments, twenty-two of them in all, and found itself happily convinced that the notion was, as might be expected, nonsense.[6] Subordinate law-making is not left entirely to subordinates. Whether he be eminent or obscure, a civil servant knows that to expose his Minister to trouble is a stony road to accelerated promotion. During the Donoughmore-Scott Committee's proceedings one of the most way-wise of public servants interjected a trenchant comment:—

> "The ordinary administrator is a timorous fowl. The one thing he wants more than anything else is to keep his Minister out of a row. . . . He runs very fast directly a Member of Parliament raises his voice."[7]

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[3] The annual totals for the seven years from 1949 to 1955, with the totals of "general" instruments in brackets, are successively 2468 (1379), 2142 (1211), 2335 (1166), 2312 (1029), 1937 (829), 1764 (706) and 2007 (657).

[4] *Report from the Select Committee on Delegated Legislation* (the Clement Davies Committee) (1953), with Minutes of Evidence, p. 73 (Q. 649): see also p. 125 (Q. 1095).

[5] *Ibid.*, p. 7, para. 39.

[6] *Ibid.*, pp. x, xxii, paras. 38, 39 and 86 of the committee's report.

[7] *Ubi supra*, Vol. 2, p. 48 (Qq. 668, 670).

Now is not that the first, and perhaps the most potent, of parliamentary controls in this country—namely, that our doctrine of ministerial responsibility to Parliament makes the Minister vulnerable to attack on the Floor of the House (at Question-Time and all the other well-known opportunities, with or without the stimulus of a vigilant press) for any ill-considered or dubious action on the part of his department, whether legislative or anything else?

Some (not all) of us may dislike civil servants, may wish to reduce their numbers, cut their pay and pensions and lengthen their working hours. A great growth of subordinate law-making over the past hundred years and more has synchronised with a great growth of the civil service; but delegated legislation did not originate in any bureaucratic appetite for arbitrary power. During the long peace of the Victorian Age it was not needed for meeting a national emergency; but its use was deliberately encouraged in order to shorten long-winded statutes, to improve legislative drafting and to relieve the ever-increasing congestion of the parliamentary time-table. The repetition of some hackneyed quotations may be permitted in this context. As early as 1780 Jeremy Bentham contemplated legislative power being delegated from a superior to a subordinate authority, " the legislator sketching out a sort of imperfect mandate which he leaves it to the subordinate power-holder to fill up." [8] The seminal influence of Bentham upon legislative form was posthumously fertile. In 1855 some eminent Statute Law Commissioners, drawing up instructions for draftsmen, prescribed that, if no considerations of practical convenience interfered, it was better to leave the detailed rules, directing the mode of working out the principle of an enactment, to be settled by the authority entrusted with the working of the Act. " This course," they said, " both greatly shortens Acts of Parliament and makes it easier to alter the rules from time to time after they have been tested by experience." [9] The advice was echoed by Henry Thring who, having begun his apprenticeship in drafting under those Commissioners, and having later been appointed standing draftsman to the Home Office, was made whole-time salaried Parliamentary Counsel to the Treasury in 1869. His classic manual, standardising the practice of his office, contained this often cited opinion: —

> " The adoption of the system of confining the attention of Parliament to material provisions only and leaving details to be

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[8] *Limits of Jurisprudence Defined*, Prof. C. W. Everett's edition (1945), p. 109.

[9] House of Commons Papers, 1854–1855, vol. xliii, Minutes of the Statute Law Commissioners' meeting of January 24, 1855. See *Parliament—A Survey* (1952), p. 239, where mention is also made of Arthur Symonds whose monograph on drafting, published in 1835, advocated the exclusion of incidental matters from the body of a statute.

> settled departmentally, is probably the only mode in which parliamentary government can, as respects its legislative functions, be carried on." [10]

That warning, uttered in 1877, was just what one of his successors as chief Government draftsman, Sir William Graham-Harrison, was telling the Donoughmore-Scott Committee over fifty years later, with even stronger justification:

> "I have no hesitation in saying that it would be impossible to produce the amount and the kind of legislation which Parliament desires to pass and which the people of this country are supposed to want if it became necessary to insert in the Acts of Parliament themselves any considerable portion of what is now left to delegated legislation." [11]

In between these two high authorities a like testimony had come from a third chief draftsman, Sir Courtenay Ilbert. Writing in 1901, he had gone on to emphasise the need of discrimination:

> "The extent to which a power should be delegated always requires careful consideration. The power should not extend to matters of principle on which a decision of Parliament ought to be taken." [12]

The ideal which the Victorian Age adopted and the twentieth century began by accepting was simple—put matters of principle into Bills for the direct decision of Parliament and relegate matters of detail to departments. There would, of course, be border-line cases; distinguishing principle from detail would not be so easy as distinguishing roast mutton from red currant jelly. But doubtful questions would somehow be settled on their merits and exceptions would prove rules.

Ideals, however, have been shattered by two World Wars, not to mention certain threats of domestic anarchy. Defence Regulations have been allowed to create offences for which they imposed the death penalty.[13] Parliament has enacted that Defence Regulations may require persons to place themselves, their services and their property at the disposal of the Crown.[14] Nor is it only the storms of emergency that submerge the ideal. Even in peace-time those "considerations of practical convenience," to which the 1885 Commissioners bade the draftsmen to pay respect, will interfere. In 1925 the right to trial by jury in High Court cases was left to be governed by rules of court.[15] In 1931 the cutting of salaries under the National Economy Act was left to Orders in Council.[16] In 1945 the "general principles" to guide the Local Government Boundary Commission in its revision of areas was left to regulations of a Minister.[17] These and other surrenders by Parliament are not to be ascribed to the power-grabbing appetite of civil servants. If then it is accepted that departmental law-making began and (at any rate down to 1914) was continued substantially as a drafting gadget, then, after an overlong pursuit, our second red herring can share the fate of the first.

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[10] *Practical Legislation or the Composition and Language of Acts of Parliament* (1877), p. 13.

[11] *Ubi supra*, Vol. 2, p. 35.

[12] *Legislative Methods and Forms* (1901), p. 310.

[13] Defence Regulations 1B (forcing safeguards), and 38A (looting): see S.R. & O. 1940 (No. 1215) II, p. 80.

[14] 3 & 4 Geo. 6, c. 20.

## AFFIRMATIVE AND NEGATIVE CHECKS

Parliament can claim credit for having, while experimentally developing delegation, evolved certain specific controls. One cannot control what one cannot see. The preliminary stage, therefore, is the requirement of information. Whenever authorising departmental law-making of any importance, Parliament (with some perhaps surprising exceptions) demands to be kept informed of the resultant instruments, the parent statute requiring them to be laid before the two Houses. Then, if it thinks fit, Parliament goes on to impose either an affirmative or a negative check. To put this in an oversimplified way, and not to pause to enumerate all the possible variants of control, the affirmative check means that both Houses must say "Yes," while the negative check means that either House may, within a time limit, say "No." These are *ad hoc* controls, imposed or not imposed in each parent statute when Parliament is enacting it. It must be assumed that on every Bill Parliament makes up its mind whether any control, and, if so, what kind of control, will be appropriate. In Utopia all these arrangements would work perfectly. In Utopia there would be no two-party system to bedevil them, no political maxim that it is the duty of the Opposition to oppose. But Utopia is the Land of Nowhere; we cannot expect that at Westminster the Whips will be taken off when these affirmative or negative motions are moved. The affirmatives are the Government's business; the Government must find the time, the quorum and the majority. The negatives are anybody's business, but the Government must have its majority in reserve to defeat them. The negative motions may come from the back benches on the Government side, but naturally they come usually from the Opposition side; how far they are officially encouraged by Opposition leaders it is not for us to guess. In theory the negative motion is something left to the vigilance and initiative of the Private Member; it is indeed one of his few remaining opportunities of originating a debate and eliciting a Government reply.

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[15] 15 & 16 Geo. 5, c. 28, s. 3.
[16] 21 & 22 Geo. 5, c. 48.
[17] 8 & 9 Geo. 6, c. 38, s. 1 (3).

The Donoughmore-Scott Committee, which included Members of both Houses, came to the conclusion that M.P.s were freely delegating powers without fully realising what they were doing; the quantity and complexity of the subordinate legislation were such that the vigilance of individual Private Members could not provide a proper supervision. What was wanted was some automatic machinery of scrutiny. The committee classified delegation as either normal or exceptional; if it was normal, it was useful, inevitable and indispensable; if it was exceptional, it needed careful watching. As for the quantity, the committee thought the departmental output was too big for individual legislators to contend with; 99 instruments out of 100, or 49 out of 50 (the proportion need not be definite), would be harmless enough; somehow the one suspicious item must be detected and subjected to further examination. Faced with a task of investigation, the House of Commons resorts to a committee [18] for at least three good reasons given by Mr. Hugh Molson:

> " First, in order that a few Members of Parliament may give intensive study to the problem; secondly, that there may be interrogation of witnesses and investigation of papers; thirdly, in order that in the seclusion of a committee room there may be comparative freedom from political prejudices." [19]

However novel its responsibility, a Commons committee will manage to shape its proceedings to discharge it. It will generally be lucky in its chairman. The committee being constituted in proportion to the strength of parties in the House, and being invited to review operations for which some Minister will presumably have to answer, its Members might find it hard to forget their political loyalties. But they are sitting round the table with men of the opposite party whom they meet in the library and smoking-room of the House, and whom often they like and respect, so that work in committee is often surprisingly uncontroversial. Sometimes they are actually debarred from concerning themselves with Government policy, either by the terms of their constitution as in the case of the Estimates Committee or the war-time National Expenditure Committee, or by the restriction implicit in their scope as in the case of the Public Accounts Committee. If so, party feeling vanishes.

For control of delegated legislation the Donoughmore-Scott Committee recommended a committee of members in each House with a twofold task—to scrutinise all Bills to see what powers of law-making they proposed to delegate, and to scrutinise all the instruments which resulted from any such delegation. The report listed the features which the committees would look out for; one of them was the delegation of matters of principle. These committees would not go into merits or policy, but would merely give the Private Member the knowledge he had no time to acquire for himself; he would then be equipped to follow the matter up at his discretion by criticising or objecting.

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[18] See Chapter VIII of Professor K. C. Wheare's *Government by Committee.*

[19] See the 1953 *Report from the Select Committee on Nationalised Industries,* para. 7 at p. v, citing from Mr. Molson's evidence at p. 38.

### House of Lords Special Orders Committee

It is odd that the Donoughmore-Scott report gave no credit, and, indeed, hardly referred, to the Special Orders Committee which the House of Lords had set up seven years earlier to scrutinise all instruments laid before the House for affirmative approval—the more surprising because this Lords Committee furnished an obvious precedent and Lord Donoughmore had himself presided over its proceedings. One day in 1924, when the House was being asked to approve three electricity orders and six gas orders (all consisting of provisions which under earlier statutes would have needed enactment in a Private Bill), the late Lord Salisbury pointed out that Parliament, when imposing the affirmative check, could never have meant it to be merely perfunctory, and yet the two Houses were in the habit of adopting these affirmative resolutions without any examination or discussion.[20] After taking thought, the Lords agreed in 1925 upon a Standing Order establishing their Special Orders Committee—" special orders " meaning in this context the orders which required affirmative approval.[1] This scrutinising committee is directed to consider four matters: —

(a) whether the provisions raise important questions of policy or principle;
(b) how far they are founded on precedent; and then
(c) whether, in view of the answers to those first two questions, or any other relevant circumstances, the instrument can be approved without special attention, or whether there should be further inquiry before the House proceeds with the affirmative resolution.

The fourth point is a general instruction that, if the committee has any doubt of an order being *intra vires*, it must say so. This last point would, perhaps, be more impressive if the Lords Special Orders Committee included some of the eminent judicial members of the

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[20] Hansard, Lords Debates, 1924, May 22, col. 646.

[1] *Ibid.*, 1925, July 14, col. 59 (committee's report) and cols. 65–67 (new Standing Order).

House as does the Lords Personal Bills Committee. Questions of *vires* being questions for the law courts, the views of laymen are inconclusive. It may be irrelevant to remark that the law reports seem nowadays to record few *ultra vires* decisions against Government Departments. If this impression be correct, the explanation may be found partly in the extreme width of the law-making powers delegated and partly in the scrupulous care exercised by departmental lawyers.[2]

But we must not wander away into judicial control. To return to the Special Orders Committee's jurisdiction, some critics have the hardihood to hint that the question about previous precedent has a rather old-fashioned look. A thing is not necessarily right because it has been done before. What was justifiable in 1940 may be intolerable fifteen years later. There can be nothing but admiration, however, for the primary position allotted to the first point, namely, whether the instrument raises important questions of policy or principle. If the answer here is "Yes," the House is warned that subordinate legislation has trespassed upon ground which ideally should be occupied by a statute. This Lords committee is not an idle body. In the past twenty years it has examined over 800 orders; in a normal year it looks at approximately sixty. The Chairman of Committees in the Lords presides. His colleagues include the leading members of political parties and also peers with departmental experience. Each member is furnished by the department concerned with an explanatory memorandum in advance. At the meetings departmental representatives (probably a senior official and an assistant legal adviser but never the Minister himself) attend and answer questions. The non-members withdraw while the committee deliberates, and are called back to hear the proposed report.[3] There is thus a direct and early contact between the committee of legislators and Whitehall. The report is printed and circulated to peers. By Standing Order the affirmative resolution is not to be put down till the report is received, If a report states that no further inquiry is necessary (as it seems to do in three out of four cases), the affirmative resolution will probably be passed without much said. If it states that the order cannot be passed without special attention, it seems to be assumed that some noble Lords will interest themselves, or at least that the Minister who moves the resolution will make a speech; after all, his Ministry will have furnished him with a brief and he may be reluctant to waste its labour. If the report declares further inquiry necessary, that means remitting the order to a Select Committee—which seldom happens. The machinery thus devised seems to do what the Donoughmore-Scott Committee wanted done; it isolates for the Private Member something which he may think it worth while to look into and follow up. The reports of this Lords Committee, even when they recommend special attention, are not always productive of full discussion in the House. The red light is waved but the train does not always stop to attend to the warning. The best debates on affirmative resolutions are not necessarily inspired by a report from the committee; they probably deal with Government policy, a field which the committee must not enter. But there was a brisk discussion on the report upon some Police Pensions Regulations in 1952, when Lord Drogheda, its chairman, spoke in amplification of the committee's views.[4] These regulations proposed several textual amendments of the principal regulations of 1949, but omitted to inform the reader that they referred to the 1949 regulations as amended in 1951. One proposed amendment, for example, said:

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[2] In letters to Mr. Justice Holmes, Professor Laski, a member of the Donoughmore-Scott Committee, criticised the committee's emphasis on expert drafting as a safeguard. The committee's report seemed to suggest (pp. 50, 70) that there was less safety if instruments were framed by the legal advisers of departments than framed by the Parliamentary Counsel to the Treasury. No change of responsibility has been made; see the evidence of Sir Alan Ellis before the 1953 Select Committee on Delegated Legislation, *ubi supra*, pp. 33, 35. There is no need to question the competence of the legal branches of departments.

[3] See "Standing Orders of the House of Lords relating to Private Bills, etc.," *Journal of the Society of Clerks at the Table*, Vol. 17 (for 1948), pp. 129–130. where Mr. Henry Burrows describes the procedure. For an occasion when, owing to the rush of business on the eve of the December adjournment, not much time was allowed for study of the report, see Hansard, Lords Debates, 1954, December 10, col. 479.

> "In paragraph 3 of Regulation 10 of the Police Pensions Regulations, 1949, for the word 'January' there shall be substituted the word 'October.'"

But, on turning up the regulations of 1949, no paragraph 3 and no word "January" were to be found. That made the riddle a good deal harder. The House, thus prompted by the committee, reasonably protested that, whatever devices of legislative shorthand might be tolerated in a Bill, a statutory instrument (which has not to endure the line-by-line challenge of a committee stage) ought not to sacrifice intelligibility to abbreviation.

## HOUSE OF COMMONS SCRUTINY COMMITTEE

Now for the Scrutiny Committee of the House of Commons, an even busier body, because it is directed to examine all instruments exposed to a negative, as well as those which require an affirmative, resolution. Since it was set up after a back bencher's motion at the end of 1944, it has looked at more than 8,500 draft or final instruments, and has drawn the attention of the House to more than a hundred. It sits once a fortnight, occasionally once a week, usually at 6 o'clock on a Tuesday afternoon. Copies of the instruments awaiting examination, with a memorandum giving a list of them grouped by their subjects, and containing such comments as have occurred to the Speaker's Counsel, are circulated to members of the committee over the previous week-end. The chairman takes the committee through the list, many items being passed without comment. The meeting, like the list, may be short or long. After the summer holidays there may be as many as 150 instruments in the list. This Commons committee, like that of the Lords, avoids issues of Government policy and consequently is happily free from partisan controversy. A spectator could not safely guess the political affiliations of its members. It has never had a division or a cross word. It has refrained from clashing with departments or telling them how to administer their concerns. It has falsified the pessimistic prediction that it would either be tolerant and therefore otiose, or else dominant and therefore constitutionally disturbing. A convention is growing up that its chairman, like the chairman of the Public Accounts Committee, should be a member of the Opposition, free from any temptation to favour the Government's side.

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[4] Hansard, Lords Debates, 1952, December 9, col. 825.

It has been suggested that this committee's scope, because matters of policy are excluded, is limited to formalities. One, however, of the six grounds on which the committee can bring an instrument to the notice of the House is that it " appears to make some unusual or unexpected use of the delegated power." That ingenious formula has proved its value. It catches cases which a member might think were *ultra vires*, cases where a Minister purports to sub-delegate legislative authority either to himself or to somebody else (quite a serious constitutional issue), and cases where a department has been guilty of some sin of omission or commission which, had it occurred in a Bill, would certainly have been pounced upon by the common sense of members of Parliament. Another ground for bringing an instrument to notice is that, without specific authority in the parent statute, it is given retrospective operation; a report on this point once led to a valuable debate in the House and drew an opinion from the Attorney-General.[5] Other grounds include unpunctuality in laying before Parliament or in publication, the imposition of a tax or charge, the exclusion of judicial control, and finally, any obscurity of form or purport. When the committee does draw attention to an instrument, it merely names the ground; it does not (as the corresponding committee in the Indian legislature manages to do) offer reasoned criticism; but its report is accompanied by copies of any correspondence with the department concerned, so that the House can see its reasons. For the committee is obliged, before reporting an instrument, to ask the department for its explanation. That is only fair and frequently the answer makes further action unnecessary; but the consequent delay diminishes the value of the machinery. Suppose a department lays an instrument before Parliament early in the week; if it misses the Tuesday meeting (as it probably will), it will not be examined for a fortnight. If, on a preliminary scrutiny, the committee thinks it may want to bring it to the notice of the House, it must communicate with the department, whose reply will come before another meeting another fortnight later. By the time the report reaches the House, some thirty days may have elapsed out of the forty which constitute the time-limit within which a resolution for annulment (the negative check) may be moved. Thus, the committee does not quite do what the Donoughmore-Scott Committee contemplated; if it tells the Private Member what to look at, it does not tell him in good time. If he is interested, he will probably have tabled his " prayer " (the popular name for a negative resolution because it prays Her Majesty to annul the instrument by Order in Council) without waiting for the committee's report. The delay, on the other hand, is the less serious because almost all " prayers " are attacks on Government policy, based on grounds which the committee is debarred from considering. The Lords committee, examining only the affirmative cases, manages to get a prompt and once-for-all contact with departmental representatives. The Commons committee, dealing with negative cases as well, cannot so easily gear its reports in with motions on the floor of the House. Why, it may be asked, cannot the two Houses set up a Joint Committee instead of having two separate committees working independently? Well, we must not expect British institutions to operate on rigidly logical lines. In the past a Joint Committee has not been enthusiastically favoured by the Commons House, and anyhow a First and Second Chamber will have a different approach. In 1950 the affirmative resolution for approving a draft Order in Council affording immunities and privileges to the Universal Postal Union sailed serenely through the Commons but ran into heavy weather in the Lords, where the Government withdrew it,[6] the Commons then having meekly to cancel the approval they had given. Maybe Second Chambers are better equipped for sifting and reporting; our House of Lords has plenty of members with executive experience; the peers are " less encumbered with the pressing distractions of everyday work " and are " less dedicated to party allegiance "; their service can contribute the element of continuity.[7] Two sieves must be better than one.

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[5] Hansard, Commons Debates, 1946, February 19, col. 1046.

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[6] Hansard, Lords Debates, 1950, July 24, cols. 534–565.

In addition to its routine reports on particular instruments the Commons committee periodically (usually at the end of a session) submits " special reports," commenting on general tendencies. One such comment has criticised a department's omission to specify in the forefront of its order the exact section and subsection which it relies on as its authority. If a Minister merely recites that he is legislating by virtue of such and such a statute " and all other powers him enabling," the cautious vagueness is unhelpful. In one instance the Minister named the enabling Act and nothing more; it was a long one, containing sixty-five sections; the power he was exercising was eventually to be discovered in section 63, hidden in a definition section.[8] Her Majesty's lieges are entitled to know what authority a Minister claims to be exercising. Certainly, if a Select Committee is to decide whether or no the exercise is unusual and unexpected, it is entitled to be saved a search for the power. The Minister must know the source and he should not withhold the information.

## PARLIAMENTARY CONTROL OVERSEAS

Two questions remain. Do Scrutiny Committees need any help from outside? And how far have they been effective in other countries? As for assistance, if more is needed at Westminster than the experienced and competent clerks of committees can provide, there are available the Counsel to the Chairman of Committees in the Lords and the Counsel to the Speaker in the Commons. The services of these two officers, who work at all times in the closest contact, especially over the Private Bills which come before the two Houses, have been placed at the disposal of the respective Scrutiny Committees. Undoubtedly their preparatory labours can save the time of a committee. The question of outside help was fully considered in another context in 1953 by the Commons Select Committee on the parliamentary control of the nationalised industries. This body recommended supervision by a Standing Committee of the House, with the aid of a staff which should include an officer with high administrative experience.[9] The recommendation was prompted by the analogy of the service given to the Public Accounts Committee by the Comptroller and Auditor General. For his investigations into departmental expenditure the Comptroller employs some four hundred accountants. Indispensable

[7] These words are used in the *Report of the Select Committee on Nationalised Industries* (1953), p. viii.

[8] See 9 & 10 Geo. 6, c. 59, s. 63 (1) (definition of " financial year of the Board ") and S.R. & O. 1946 No. 2092.

[9] *Report from the Select Committee on the Nationalised Industries* (1953), paras. 28–34.

as is his guidance, it does not follow that a similar arrangement would suit other committees whose functions are not exclusively financial. The analogy was, however, accepted in South Africa by a Select Committee which, in 1949, concluded an inquiry into the control of delegated legislation.[10] Obviously impressed by the evidence of Mr. R. P. Plewman, the Union's Controller and Auditor General, the South African committee recommended the appointment of an official as "scrutineer" who would report instruments meriting special attention on certain grounds; his reports would go to a Select Committee. At Canberra the Scrutiny Committee of the Senate has the assistance of a member of the Sydney Bar.

When we look overseas for comparable techniques of parliamentary control, the Australian experience is stimulating. The Senate at Canberra appointed a Scrutiny Committee in 1932 to which, under Standing Orders, all the regulations and ordinances laid before the House stand referred for consideration and, if necessary, report. This committee applies itself to ascertain that instruments—

(a) are in accordance with the parent statute;
(b) do not trespass unduly upon personal rights and liberties;
(c) do not unduly make the rights and liberties of citizens dependent upon administrative, and not judicial, decisions; and
(d) are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

The first of those four points—whether the order is in accord with the parent statute—seems to raise the question of *vires, ultra* or *intra.* The other three are attractive, especially the fourth, with its reminder of the ideal accepted in Britain down to 1914 of putting matters of principle into statutes and matters of detail into subordinate legislation. The committee, by the way, acknowledges itself bound by the rule that questions involving Government policy lie outside its scope.

How does this Canberra formula work in practice? The Senate Committee, it seems, does not report unless it has something to say. It has made nine reports in its twenty-four years of existence. The reports are debated in the House on a motion for adoption. They are said to be keenly discussed by the Senate in debates which are short and blessedly relevant, and the committee's recommendations are said to be well received by the Government. Not long ago an ex-chairman of the committee became Attorney-General; he is credited with having taken a particularly alert interest in the committee's work. As recently composed, the committee included two lawyers among its seven members. Our Commons committee at Westminster has also a strong contingent of legal members. In both cases legal assistance has already been made available *aliunde*, but the legal profession produces useful committeemen. We might remember that, when Alexis de Tocqueville wrote of the tyranny of majorities (of which, by the way, he spoke before a Select Committee at Westminster in 1835), he looked to lawyers to protect the rights of minorities.

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[10] Nothing came of the report of this committee which the House of Assembly had appointed in 1947, and reappointed in 1948 and 1949. Mr. Plewman has lately sought to recall attention to the matter by articles in the press; see *Cape Times,* 1956, January 23 and 24.

In Australia substantially all the delegated legislation has to be laid on the table of the two Houses under a general law for which Westminster has no counterpart,[11] and, if either House passes a motion for disallowance, the instrument thereupon ceases to have effect. Judged by mere arithmetic, the Senate Committee has a lighter task than our Commons Scrutiny Committee. It sees about 110 statutory rules a year as well as about 100 ordinances.[12] It is noteworthy that, under the Canberra Standing Order, delegated legislation " stands referred " to the committee. The committee thus has both the power and the duty to keep regulations under continuous review throughout their operation, in case time should alter their significance.[13]

Constitutional climates differ. It seems that, when the Canberra committee reports that some important matter of Government policy should have been dealt with by parliamentary enactment and not by subordinate law-making, the Minister has been known to concede the point and to make amends. We can hardly imagine our own First or Second Chamber exerting such influence, although, when our Commons Scrutiny Committee has made comments in a special report, a Treasury circular will bring them to the attention of departments.

Extending our study of legislative processes overseas, we find that there is delegated legislation within the United States of America, in spite of the rigidly tripartite division of functions expressed or implied in Federal or State constitutions. The Supreme Court at Washington tolerates it within broad limits:

> "To be sure Congress still attempts to legislate in detail, but it has long since recognised the need for delegating the rule-

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[11] Acts Interpretation Act, s. 48.

[12] The Ordinances are the laws made for the Australian Territories such as Papua and New Guinea.

[13] To Mr. J. R. Odgers, Clerk Assistant to the Senate, I owe my warm thanks for information about the Senate Committee. Chapter XVIII of his *Australian Senate Practice* contains a masterly statement of delegated legislation in the Australian Parliament.

> making power as a means both of meeting novel and rapidly changing situations and of reducing its own burdens."[14]

The safeguards on which Congress relies are its requirement that branches of the administration shall submit periodical and special reports on what they do; its formal requests for information; its summoning of administrators to testify at hearings concerning their work; its searching investigations into the activities of administrative agencies, and, of course, its criticism of particular regulations on the floor of the House or the Senate. Congress did, indeed, enact something like our negative type of parliamentary control in the Reorganisation Acts as a check on presidential orders, and in one case the Senate exercised a veto thereunder. But in 1941 the Attorney-General's Committee on Administrative Procedure had declined to recommend any general requirement that regulations be laid before the Legislature before becoming effective. "Legislative review of administrative regulations," said the 1941 report, "has not been effective where tried." Latterly, at least one American expert in political science has challenged that opinion as a too summary judgment, and has suggested that his country might do worse than look across the Atlantic at our Commons Scrutiny Committee.[15] Some of the American states have experimented with controls similar to our affirmative and negative methods. A Wisconsin statute requires the food standards of its Department of Agriculture to be approved by joint resolution of the Legislature before they can take effect, and Virginia and Kansas have provided for legislative annulment of subordinate laws. In the State of Connecticut regulations must be examined by the Attorney-General and submitted to the next session of the Legislature for review with public hearings before the appropriate committee.[16]

New Zealand seems not to have felt the need of any special parliamentary machinery for our purpose; but in South Africa, as already mentioned, the House of Assembly has had its inquiry into possible methods of control. In India a Committee on Subordinate Legislation was set up at Delhi in 1953 under rules of procedure of the House of the People

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[14] Geo. B. Galloway, *Congress and Parliament* (1955) p. 69. This monograph judiciously and concisely compares and contrasts the legislatures of the United States and the United Kingdom.

[15] Professor Bernard Schwartz, in the *New York University Law Review*, May, 1955, Vol. 30, No. 5, pp. 1031–1045.

[16] See *ibid.*, pp. 1037–1039, and Chief Justice Vanderbilt's *Doctrine of the Separation of Powers and its Present-day Significance* (1953), pp. 85–86. The system of public hearings and other efforts towards public participation in the rule-making process under the Federal Administrative Procedure Act of 1946, and other American statutes, is scarcely for import into the United Kingdom.

> "to scrutinise and report to the House whether the powers to make regulations, rules, sub-rules, by-laws, etc., conferred by the Constitution or delegated by Parliament are being properly exercised within such delegation."

Directed to examine the subordinate legislation which is required to be laid before the House (a requirement infrequently prescribed in pre-1947 statutes), it has now decided to examine all the subordinate law-making, whether so required or not. It is told to look out for the same points as our Commons Scrutiny Committee, with two more in addition, namely—

- Whether the provisions are in accord with the general objects of the Indian Constitution or the parent Act; and
- Whether they contain matter which the committee thinks should more properly be dealt with by Act of Parliament.

The Delhi committee can report its opinion that an "order" (the word is used in a comprehensive sense) should be wholly or partly annulled or amended. It is understood that most of its members are lawyers; its chairman, a distinguished lawyer, is a member of the Opposition party. It consists of fifteen members and the quorum is five. The attendance is said to be good. The committee scrutinises Bills as well as orders. It does not hesitate to advise the Government on its legislation or to suggest amendments to rules. Its reports contain detailed comments, sometimes two pages long, on particular instruments, as well as general recommendations on such matters as reprinting of frequently amended orders, central numbering and publication. In the session 1954–1955 it held seven meetings and scrutinised 131 orders. Its latest report for the session 1955–1956 shows that it held three meetings and scrutinised 233 orders, drawing attention to more than fifty cases of delay in laying orders before Parliament.[17] It is evidently a vigorous and independent body.

### Select Committee on Delegated Legislation

Enough of comparative material; it is the Westminster problem with which we are primarily concerned. Paradoxically, when the subject was last investigated by the House of Commons (in 1953), the issue was not so much the control of delegated legislation as the control of attacks on delegation. In a period of slender majorities the incessant moving of negative resolutions for the annulment of instruments had been practised, according to the Leader of the House, "for no other reason than the physical exhaustion of honourable members and Ministers of the Crown."[18] As Lord Attlee has recorded:

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[17] I am indebted to Shri S. L. Shakdher, Joint Secretary, for material information about the Delhi committee.

[18] Hansard, Commons Debates, 1951, March 19.

> "It was not pleasant to have members coming from hospital at the risk of their lives to prevent a defeat in the House. The Opposition tactics were designed to wear out our members by keeping them late every night. This was done particularly by 'prayers' against orders. These come on after the ordinary business of the day." [19]

One night the Government found itself obliged to move the adjournment of the House in order to prevent the moving of these negativing resolutions.[20] Presently a General Election turned a Labour Party majority of 8 into a Conservative Party majority of 16, and the hares and hounds changed places.

Towards the end of 1952 a Select Committee on Delegated Legislation was appointed

> "to consider in what respects the existing procedures by which the control of this House over delegated legislation is exercised need to be improved or supplemented and by what means this can best be achieved."

It was a strong committee over which Mr. Clement Davies presided. Four of its members had held the high office of Secretary of State; they, at any rate, knew the problem from both sides of the table. Indeed, the questions of the members of the committee are quite as enlightening as the answers of the witnesses. All sorts of suggestions were examined. Should a Standing Committee sift statutory instruments? Should the House sit specially in the morning to dispose of "prayers"? Should the hearing of "prayers" be remitted to a Standing Committee? Should Ministers be made to submit their proposed instruments in draft to a Standing Committee where criticism and explanation could be exchanged? Should the House have power not only to approve or reject but also to amend instruments? Should persons aggrieved by an instrument have the chance, under some new procedure, of a hearing? If deprivation of sleep had become a weapon of parliamentary opposition, might not M.P.s, instead of having to sit up past midnight in order to take part in a division on some motion for the annulment of an instrument, record their vote in comfort at tea-time next day?

None of these suggestions found favour. Some of them would merely have increased the labours of the House which delegation was designed to lighten. One practical and sensible improvement was adopted. No motion for annulling an instrument is to be moved after half past eleven at night; if, when that moment is reached, such a motion is being debated, a vote will be taken unless the Speaker considers that the discussion deserves to be renewed next day, in which event he will adjourn it accordingly. This Select Committee carried out a thorough overhaul of the parliamentary control of delegated legislation. It declared the work of the Scrutiny Committee to be satisfactory. The Donoughmore-Scott Committee report in 1932 had, on the whole, been reassuring; the Clement Davies Committee of 1953 found even less to criticise. The questions and answers at the latter inquiry revealed the realisation by members of all parties that, under colour of exercising the legislative control of the Executive, the rules of parliamentary procedure could be so abused as to render the House of Commons impotent. Members of all parties, however, showed themselves united in their resolve that this should not occur.

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[19] *As It Happened*, p. 206.

[20] Hansard, Commons Debates, 1951, March 19 and 21.

Two World Wars have accustomed the people of Britain to an abnormal type of blank-cheque delegation. In neither case was there any headlong haste, after peace had been restored, for review and remedy. After 1918 we had to wait till 1932 for the Donoughmore-Scott Committee to tell us what to think of the exceptional development of delegation. After 1945 we had to wait till 1953 for the report from the Clement Davies Select Committee. Between these two investigations, neither of which produced any revolutionary changes, there was an interval of some twenty years. On that basis our reformers have ample leisure for thinking out how parliamentary control can be improved or supplemented before the next inquiry sometime in the nineteen-seventies.

# THE AMERICAN ADMINISTRATIVE PROCEDURE ACT

Louis L. Jaffe

The Administrative Procedure Act [1] (APA) is a landmark in American administrative law. It marks the close of a great creative period and the beginning of a new phase of stabilisation and of development in detail.

The tremendous proliferation of administrative power in the 1920's, reaching its zenith in the first few years of the New Deal, alarmed the lawyer community. Basically, no doubt, it was the substance of the granted powers with their threat to the *status quo* which was disturbing. But there can be no question that those who sought and used the new power were somewhat heedless of our tradition of procedural protections. The ensuing battle was fought with broad strokes on both sides. Conservatives rallied to the cry of the " New Despotism " and the New Dealers shouted back " Reaction." There came a point where what was needed was a dispassionate—or at least a balanced—study of the chief charges and countercharges. This need was well met by the so-called Report of the Attorney-General's Committee in 1941.[2] The Report formulated certain general principles, and in the light of them surveyed the field. It proposed no fundamental changes in the existing organisation of the administrative process. It did not, for example, recommend the elimination of the much criticised combination of prosecution and judging functions within a single agency. But it did propose that within the agency autonomous units, separate from each other, handle the functions of prosecution and decision.[3] And it proposed a further reform which has since become the key element in the new system. To understand it one must realise that in all so-called " agencies " or departments the amount of business precludes a hearing by the " members " of the agency or the head of the department (cabinet officer, " administrator " or what not). It is therefore necessary that the hearing be held by a subordinate officer who in the federal system has come usually to bear the title " trial examiner." This officer in the first flush of the New

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* The Author is Byrne Professor of Administrative Law, Harvard University.

[1] 60 Stat. 237 (1946), 5 U.S.C. § 1001, *et seq.* (1946). Hereinafter cited merely by section numbers.

[2] Attorney-General's Committee on Administrative Procedure, Final Report (1941).

[3] *Ibid.*, 55.

Deal was apt to be very much a part of the agency organisation and to share enthusiastically in its plans for the future. He acted on occasion with the zeal of Dufarge and his Madame. The Attorney-General's Committee proposed[4] that this officer be given an " independent " status and thus mitigate the massive dynamism of the agency. The intervention of war postponed legislative reform until 1946. But in the meantime the agencies themselves had undergone a phase of drastic self-criticism and had reorganised their procedures in the light of the principles which were being developed in the Great Debate. When, in 1946, the Administrative Procedure Act was passed, much had already been done to conform to its standards. Thus was brought to conclusion the stage of fundamental reorganisation and settlement.

The APA has been fulsomely praised and sharply attacked. It is claimed, for example, that it changed nothing, which may, of course, depending on your position, be good or bad. It is surely, inexpressibly complex, a Chinese puzzle compounded of peculiar circumstances and special cases, as one can certify who attempts each year to reveal its mysteries to students. Its definitions depart from standard logic, and at times one comes out with the " right " interpretation because he has already instructed himself by recourse to statutory history and other aids as to the result before he began the quest. It has also been charged that it is the product of lawyers dominated by special interest and professional prepossessions, and that it was pushed through without the advice of government administrators. But this is not true, either as a description of the process of its formulation or of the finished result. It must be confessed, nevertheless, that the difficulty of grasping without hard study its involuted pattern may give rise to misconception. Despite these things, indeed in a sense because of them, the APA is a distinguished achievement in law and politics. It is complex because the forces which fought over the settlement of its terms had as their goal to mediate between the demand for procedural guarantees and the need for the effective administration of a great variety of programmes. The American Bar Association insisted upon a single Act—a code as it were—purporting to deal generally with " administrative procedure." No agencies, no " sacred cows," must be excepted—at least not by name. The representative power of the Bar Association was sufficient to compel acceptance of this demand, even as against, for example, a powerful drive for wholesale exception by the Interstate Commerce Commission (at that time still riding high[5]). But the prestige of

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[4] *Ibid.,* 46.

[5] The Commission did, however, succeed in forcing into the Act a number of " exceptions " and " escape " clauses phrased in general terms.

Administration was great. Its achievement had won gratitude and respect, and it was able to insist that it not be hamstrung by a rigid, uninflected version of the rules of civil procedure. The result was a statute tailored to the federal establishment, a series of definitions, prescriptions, and exceptions developed in terms of apparent generality but carefully constructed to describe the variety of administrative situations. The APA is clearly not a prolegomenon to all future administrative procedure acts, it is not a codification of formal doctrine, it is not a model for any other State or country. But it has made an important contribution to administrative law because its spirit and philosophy do have general validity.

## THE PASSING OF THE ACT

There is, I think, one aspect of this legislation which is of paramount significance, namely the manner of its enactment. There are those who believe that it was foisted upon the country by the American Bar Association. This is a possible view. Without the Association's determined campaign the Act might not have reached the statute book. The Bar Association is, of course, essentially a conservative force representing the economic interests of the minority most threatened and most emotionally disturbed by current administrative activity. Yet their interests are *part* of the interests of the country and are almost universally recognised as entitled to a measure of protection. And the appeal for their protection was made in the name of a fundamental procedural tradition which is valued by the great majority. The Attorney-General was led to believe that the occasion called for adjustment, for compromise and for reconciliation. The Act was the result of months of careful, leisurely and continuous conference between the Attorney-General's office and a committee of the Bar Association. The conferences were conducted under the auspices of the Congressional Judiciary Committees, which had signified their intention of securing legislation. The Attorney-General's office went back again and again to each of the administrative agencies with draft and redraft, reserving final decision to itself. The Attorney-General (starting from the earlier Attorney-General's Report) and the Bar Association committee (having behind them the many proposed bills on the long road from the Absolute to the Relative) travelled toward each other. If this process did not assure the soundness of every feature of the Act, it testified to the attempt, a sound one in my opinion, to express as many of the valid competing claims as was consistent with reasonable lucidity and coherence.

One might, perhaps, conclude that the Bar Association, predominantly the champion of business and industrial interests, is more powerful and effective politically in this country than in England. It is, I think, startling even in the United States to find a sovereign State negotiating with a private association the terms of major legislation under the umpireship of a legislative committee. But the very realism of the process, its overt and almost institutionalised character has much to recommend it. If there was on the side of the Bar an assertion of power, there was also an acceptance of responsibility, a recognition that acting in an almost public capacity it must give disinterested consideration to the public interest.

## ADMINISTRATIVE PROCEDURE

I must commence with a caveat. The substance of administrative power differs widely from country to country, and as a consequence a critical problem in one country may be non-existent in another. The differences may affect not merely the detail of particular administration but the conceptual organisation of the whole area of administrative law. The heart of American administrative power is the regulation of certain capitalist enterprises—transportation, power and communications for example, which in England are predominantly public enterprises. We in America have sought in this area to preserve the substance of private initiative and yet subject it to an intensive public control exercised under broad delegations of discretion. On a somewhat more restricted scale we have entrusted to administrative process the policing and adjudication of certain illegal activities which under normal practice would be entrusted to the civil and criminal process of the courts. It is in connection with these administrative activities that the hottest battles have been fought. On the other hand, slum clearance, the taking of property or houses for public purposes, the very storm centre in England, as I understand it, of "administrative law," is in this country a matter which has given rise to almost no controversy. Why? Largely, I would gather, because with us the compensation for property taken by the government is extremely liberal and, in the absence of an agreement between the government and the owner, is determined by the American jury which reflects the typical prodigality of the present American scene. But there are no doubt problems common to American and British administrative law: licensing, old and new; the regulation of the professions; and the civil service; workmen's compensation. In these fields there are certain typical problems, above all that of procedural protection, which at bottom are similar. And of general concern to America and Britain is the power of the judiciary to determine the legality of administrative action.

### *The Right to be Heard*

The right to be heard before being judged is the paramount safeguard against the abuse of power. It has been enshrined in a Latin motto: "audi alteram partem." This concept we derive from our central concept of respect for the individual. Before an individual is judged, before, that is to say, he is singled out for the application of public power, he should be presented with the facts which warrant the judgment and be permitted to absolve himself. Though the general principle is clear, its application is controversial. There can be no question of its application if a named individual is to be imprisoned or fined or his person or property is to be made liable for the enforcement of an order or judgment. But when a licence is revoked there has been a question whether the principle gives a clear answer. An English judge has recently said that such an act may not be "judicial."[6] It is difficult to understand the relevance of this abstraction to the claim for fair treatment. The revocation is a serious interference with an individual's freedom of action. One may concede that no force or sanction is applied against him as a direct consequence of the order, but if he should defy the order and act without a licence his body or property will be forfeit. American courts on occasion deny the right to hearing in such a case for the reason that certain licences are "mere privileges." Thus, there is a "right" to practise law, but merely a "privilege," in this terminology, to engage in marginal or shady trades such as dispensing liquor or running a "pool" hall. But this distinction is falling into disrepute and the right to hearing is gaining ground. It may be asked by what warrant a court holds that a hearing is required, and that lacking one the act of an officer is void. Its warrant is no more nor less than the inherited power of the court to make and apply the common law in administering the prerogative writs and the actions of trespass. American courts, it is true, can base their decisions on the constitutional guarantee of due process, but except where the legislature has explicitly excluded a hearing the common law principle suffices, and has been the ground of a large body of American decisions establishing the right to hearing.[7] There are, however, a number of adjudications, in the sense of determinations affecting named individuals, in which the courts have ruled that there is no common law or constitutional right of hearing, *e.g.*, status determinations of civil servants,[8] exclusion of aliens [9] (for deportation of aliens there must be a hearing [10]), governmental bounties of land or money. And there are areas where the authorities are in conflict, *e.g.*, application for licences, revocation of licences in marginal or questionable enterprises.

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[6] *R.* v. *Metropolitan Police Commissioner* [1953] 1 W.L.R. 1150.

[7] See a treatment of the subject in Davis, *Administrative Law* (1951), c. 6, particularly at 246, 252. For the English law see de Smith, "Administrative Hearings in English Law," 68 Harv.L.Rev. 569 (1955).

[8] *e.g.*, *Bailey* v. *Richardson*, 182 F.2d 46 (D.C.Cir. 1950) aff'd. *ex necessitate* by an equally divided court, 341 U.S. 918 (1951).

It is generally accepted that in the absence of statutory requirement neither the Constitution nor the common law requires a hearing as a condition of the valid making of a rule or regulation. In a famous case Mr. Justice Holmes said: " The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." [11]

But this dichotomy of rule and adjudication, basic as it is for many problems of our administrative law, has not always been decisive. It has already been noted that the regulation of the so-called " public services " is the core of American administration. The most crucial aspect of this regulation is the fixing of the price—or rate as it usually is called—of the service. Typically, as in the regulation of gas and electricity supply, the regulated enterprise is the single venturer in the area. It has been customary to relate the rates to the specific investment involved: the company is entitled, it is said, to a " fair return " on its investment. Yet a price or rate schedule is in form a rule or regulation governing future transactions of service and sale. But a price schedule based on a specific investment has an aspect of adjudication. Until very recently, at least, these entrepreneurs were the favourites of the courts and the due process clause itself was held to protect them from rates which " confiscated " their property. It was thus natural that the adjudicatory aspect of the power should be uppermost in determining the right to hearing. There has, accordingly, grown up a well-established tradition of hearing in " rate making." The tradition has been extended to rate making situations in which there are a limited number of entrepreneurs even though the rate is not tied to specific investments, *e.g.*, the railroads,[12] the insurance companies.[13] But it has not, however, been extended to the regulation of prices of commodities sold in a general market by a large, indeterminate number.[14]

[9] *e.g., Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206 (1953).

[10] *Wong Yang Sung* v. *McGrath,* 339 U.S. 33 (1950).

[11] *Bi-Metallic Investment Company* v. *State Board of Equalization of Colorado,* 239 U.S. 441 (1915) at 445.

[12] *United States* v. *Abiline and Southern Railroad Company,* 265 U.S. 274 (1924).

[13] *Jordan* v. *American Eagle Fire Insurance Company,* 169 F.2d. 281 (D.C.Cir. 1948).

[14] *Bowles* v. *Willingham,* 321 U.S. 503 (1944).

Now the first thing to be noted of the APA is that it makes no contribution to the law concerning the right of hearing. It does distinguish between rule-making and adjudication: certain consequences as we shall see follow from this distinction but nowhere is it provided that in the one case there shall be a right of hearing and in the other not. Why is this so? The reasons are, I think, twofold. *First*, as our discussion has already suggested: though the principle " audi alteram partem " is beyond dispute, it is difficult to frame rules for its application. There are two quite appropriate ways in which to deal with this problem: the legislature may prescribe from case to case or the courts may decide from case to case. Our courts have been doing this for many years and in the absence of a codification they appear to be willing to continue their creative umpireship of the conflict between administrative convenience and personalised justice. *Second*: in the federal establishment the most important cases had already been settled by statutes giving a right to hearing.

The APA does, however, set up a notice procedure for rule-making.[15] General notice of proposed rule-making shall be published in the Federal Register and shall include a statement of the time, place and nature of the rule-making and either the terms of substance of the proposal or a description of the issues. The agency must then afford interested persons an opportunity to submit views either in writing or orally (as the *agency* chooses). This informal and flexible process has worked well. The agencies have been intelligently discriminating in their choice of written and oral procedure. In a given rule-making there may be a considerable range of issues: some routine, some technical, some charged with emotion and controversy. Technical issues may sometimes be best canvassed by consultation and written exchange. Certain controversies are best aired in the give and take of the public meeting. The agencies have under the APA notice procedure made distinctions along these lines.

The most intricate and characteristic provisions of the APA deal with the procedure for adjudication and rule-making where the adjudication or the rule is " required by statute to be determined on the record after opportunity for an agency hearing." We might for convenience call this " formal " adjudication or rule-making. This procedure then is applicable if (a) a statute requires a hearing and (b) the decision is to be made on the record and the record alone. In such situations there is provided a certain procedure which is applicable to both rule-making and adjudication.[16] But there are additional procedural protections which are applicable only to adjudication.[17]

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[15] § 4.

[16] §§ 7, 8.

[17] § 5, particularly § 5 (ç).

These are found in the so-called "Separation of Functions" provision. Correctly to understand these provisions we must once more go back to certain aspects in the history of our administrative establishment.

### *Combination of Prosecuting and Adjudicating Functions*

Without doubt the most acute problem of our administrative system is created by the so-called combination of prosecuting and adjudicating functions within one agency. There was a time when the most forward of administrative lawyers insisted that the combination was a necessary and inevitable feature of an effective administration of policy. Senator Benton, with an amazing disregard of history, said in the debate to repeal the provision of the Taft-Hartley Act which had established an "independent" prosecuting officer for the Labour Board:

> The Taft-Hartley Act introduced a new concept into the sphere of Government management by creating a double-headed monstrosity for the administration of a single statute. Such a concept is contrary to every principle of sound administration, whether Government or in private industry.[18]

Yet it is evident that such a combination of functions is not the norm. The great majority of proceedings to enforce basic policy have been and are adjudicated before traditional tribunals, which have no responsibility for evolving policy or for enforcement.

Whence did it come about that this combination became so pronounced a feature of our administrative establishment? First, it must be admitted that certain examples of it are of long standing: licensing agencies in the United States have more often than not had the power to revoke licences for violation of law. But it was the Interstate Commerce Commission which foreshadowed this aspect of our administration. This Commission was established to control monopolistic railroad rates and to eliminate "unreasonable" discrimination among shippers. The Commission, however, did not ordinarily take the initiative in proceeding against alleged violations of law. Cases of discrimination, even of excessive rates, were as a rule initiated and prosecuted by private parties. Furthermore, the emphasis in these proceedings, particularly where rates were concerned, was less accusatory, less an attempt to affix blame, than it was legislative: to set rates for the future. The more obvious breach with the tradition came with the Federal Trade Commission which was authorised to initiate and try charges of unfair practices in restraint of trade and other violations of law paralleling existing criminal and civil proceedings.[19] Curiously, this aspect of the Trade Commission's jurisdiction was not much appreciated or thought about by its proponents. If one reads, for example, the dissent of Mr. Justice Brandeis in *Federal Trade Commission* v. *Gratz,*[20] one is struck by his insistence that a cease and desist proceeding is *totum coelum* different from an equity injunction which to the ordinarily oriented mind it seems to resemble almost totally. The Justice emphasises that the Trade Commission is a " supervisory " body to seek out incipient growths before they mature into real offences, and is thus hardly an adjudicatory body at all.[1] But this analysis will hardly hold water. The Trade Commission's accusatory and adjudicatory character cannot be so easily blinked away. And so when it came to the National Labor Relations Act,[2] it did not seem a break with precedent to establish after the pattern of the Trade Commission an agency combining the most highly charged prosecutory character with power to adjudicate. It cannot be gainsaid that this concentration of functions provided a governmental instrument of incisive power and effect, and that in a few years it remade the relation between labour and capital. The change may have come about in any case, but the reform was so long overdue that something approaching revolution seemed warranted.

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[18] 96 Congressional Record, 6871 (1950).

[19] 38 Stat. 719 (1914) as amended, 15 U.S.C. § 45 (1952).

The Attorney-General's Committee was disturbed by the far-reaching implications of the Trade Commission—Labour Board organisation, but it concluded that it was at least *pro tanto* acclimatised and that it had singular advantages. The Committee, rather than recommend its abolition, suggested devices for mitigating its dangers. These were of two kinds. Both have been adopted in modified form in the Administrative Procedure Act. The first was the establishment of the office of trial examiner. This officer was to be qualified by an agency independent of the operating agency (under the APA, the Civil Service Commission) he was to be free from removal by the operating agency.[3] It was he who was to conduct the initial hearing; he was to have no other function and was to be isolated from the rest of the agency, particularly the prosecuting staff. He was to make a decision or at least a report to the agency. The agency thus presented with the judgment of a man so qualified and so situated could not lightly ignore it. But this provision for a decision or recommended decision by the trial examiner is not required in rule-making or initial licensing.[4] The theory is that cases of this sort are primarily technical rather than accusatory; that, therefore, the views of the trial examiner in his role of an " independent " observer are not crucial. Furthermore, the report or a proposal of the entire staff emanating from its policy and technical sections will be more illuminating, more cogent than the report of the isolated trial examiner. However, most agencies do use the trial-examiner report even in these situations.

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[20] 253 U.S. 421, 429 (1920).

[1] *Ibid.*, at 434–445

[2] 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151–168 (1952).

[3] § 11.

[4] §§ 5 (c), 8.

It is further provided [5] that " no officer engaged in the performance of investigative or prosecuting functions in any case shall participate " in any stage of the decision of the case. This provision for " separation " does not, however, extend to all " formal " proceedings: it does not extend to " rule-making," it does not extend even to all " adjudications." Thus, it does not extend to the initial application for a licence (as opposed to renewal or revocation) nor to proceedings involving the validity or applications of rates, facilities, or practices of public utilities or carriers. The exact delimitation thus created is not in all respects precise either in statement or theory, though the general sense is clear. Roughly, the situation is that the separation provisions apply to proceedings involving a strongly accusatory flavour: unfair trade practices, unfair labour practices, revocation of licences. It was thought that the accusatory element, the element of decided prejudgment, as it were, is less characteristic of, let us say, a rate-making proceeding, though it must be admitted that even in such cases an agency may start out with a tentative commitment. Furthermore, it was felt that in such cases the need was greater for close and continuous consultation with staff. The solution thus was a compromise: separation where technical considerations were less and the accusatory aspect predominant; nonseparation where these two factors were reversed. The " separation " provisions are a prime instance, then, of both the complexity of the APA and the delicate balance which it has attempted between the needs of the administration and the tradition of disinterested adjudication.

The APA establishes (subject, however, to various exceptions or escape clauses) a procedure for the final decisional stage of formal adjudication and rule-making.[6] For most cases of adjudication the hearing officer (the trial examiner) must formulate and issue to the parties an initial or a recommended decision. This is intended to be one of the most significant features of the procedure; it is a further corollary of the " separation " provisions. The supposed hallmark of the trial examiner is " independence "; furthermore it is he who has come into direct contact with such voice testimony as there may be. His decision, therefore, is potentially both disinterested and informed and its publication is a moral and in some measure a legal obstacle [7] to a wilful and preconceived decision by the agency itself. But in some of the adjudications (initial licensing, rates, etc.) any person qualified to be a trial examiner (it need not be the examiner who heard the case) may make the initial decision. And in rule-making and initial licensing the agency may designate any member of its staff to prepare a proposed decision. The agency, however, may proceed to decisions without any report when " it finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires." [8] Here the function of the proposed decision is not to have the judgment of an impartial hearing officer (since rule-making is not thought of as essentially accusatory) but to focus the issues in order that parties may know what they must meet and may thus argue their case intelligently before the agency. For this purpose a report proposed by the entire agency staff may be superior to a report from the rather isolated trial examiner who has presided at the taking of evidence. The combined technical and policy-making resources of the staff directed to the record made at the hearing may produce a more highly articulated, well-informed report, a report more likely to give effective notice to the parties for the purpose of the final argument to the agency itself.

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[5] § 5 (c).

[6] §§ 7, 8.

[7] It has been held that the agency must accord considerable respect to his rulings on credibility. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951).

The English reader will be aware that at this point we are in some measure treading the battle-scarred field of the *Arlidge* [9] case. He will have noted that if the matter at hand is an adjudication the hearing officer's report to the agency will be published. But if the matter is rule-making there need be no report by the hearing officer. There will, however, usually be a " proposed " report by the staff so that (as was not true in *Arlidge*) the party will be advised of the case to be met. It is, however, possible under the APA that the agency could confer orally with the trial examiner. Nothing in terms forbids it. The agency, it is true, cannot consult with the prosecuting staff (but the trial examiner is not one of these). It is also true that where a decision rests on " official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded opportunity to show the contrary." [10] But the hearing officer's off-the-record comments are not " material facts " or evidence of them. Nevertheless, though there would appear to be nothing in the APA which forbids off-the-record consultation with the trial examiner, one understands that the tradition would forbid it.[11]

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[8] § 8 (a) (2). This was one of the " escape " clauses won by the Interstate Commerce Commission. Normally, however, it does have prepared and published a trial-examiner report.

[9] *Local Government Board* v. *Arlidge* [1915] A.C. 120.

[10] § 7 (d).

[11] The Taft-Hartley Act dealing with Labour-Management relations expressly forbids consultation between hearing officer and agency members. 29 U.S.C. § 154.

The so-called " independence " of the trial examiner with its concomitant of strict isolation from the agency staff is becoming the keystone in the arch of the system of formal hearings. There is, indeed, a current danger that the independence of the trial examiner will become a fetish. Among those who are constantly preoccupied with " reforming " administrative law, which almost invariably means making it over more and more in the image of the civil law, there is a movement to make the trial examiner the effective centre of decision with the agency or department reversing his judgment only for " error." We can agree that the trial examiner's rulings on credibility are entitled to controlling weight but it seems clear to us that the agency or department with its institutional resources should remain in absolute control of law and policy-making.

## JUDICIAL REVIEW

In section 10 of the APA will be found within a short compass the main elements of judicial review as it functions both in the state and federal systems today. The APA added, indeed, very little to the law of that subject as it had come to stand just before its enactment though it may have in some measure broadened the review of findings of fact.

There had developed a rather remarkable degree of uniformity throughout the United States in the primary principles governing judicial review, though there continues to be a great variety in procedural detail. Judicial review, as in England, is based either on statutes specifically establishing review of certain administrative actions or on common law forms: the prerogative writs and damage actions. In some states the system of writs has been codified and more or less simplified; and in nearly every state there are some statutes concerning these writs. Potentially this congeries of statutory proceedings and common law writs could give rise to a mere medley of devices each with its own rules governing the occasions and scope of review, and with gaps where because of oversight there is no review at all. But in the last few years there has been a determined effort by judges, lawyers, and legislators to rationalise these remedies into a system governed by a few leading ideas. This had been in part the work of statutes but to a greater extent the work of judges, sometimes indeed of judges bent on simplifying and unifying in the face even of statutory variations and qualifications.

The kernel of the development of judicial review in America has been the writ of certiorari. This development has taken place in the states; the writ was little used in federal practice and in 1913 the

Supreme Court in a decision [12] reminiscent of recent English decisions gave common law certiorari the *coup de grâce*. Certiorari has been used traditionally to determine the so-called " jurisdiction " of an officer in cases when the action was taken on a " record," where, that is, the *manner* of acting was " judicial." But this at least in the seventeenth and eighteenth centuries did not require that the action be " judicial " in its substantive character. All actions of the justices of the peace, for example, including their rule-making were reviewed as of course by certiorari. In the eighteenth century the writ did no more than search the face of the record for jurisdictional defect. The evidence did not come up nor did the court itself take evidence, though the officer's return to the writ might reveal matters which were relevant to the determination. In the middle of the last century certain of the state courts, for example New York and New Jersey, transformed this writ into a general all-purpose writ of review in cases where the agency was required to adjudicate upon the basis of a hearing. The first step was to require evidence to support " jurisdictional " findings and the final step was to hold that all questions of law were " jurisdictional." Thus it became customary to make a record of the evidence of the administrative hearing and to certify this record for review. The structure of the review was determined by the familiar dichotomy of fact and law. The court itself did not make findings of fact even of so-called " jurisdictional " facts but the administrative findings must be supported by " substantial evidence "; the court could itself decide all questions of law, though our analysis recognises that certain questions sometimes called " mixed " questions of law and fact may be appropriately classified as " questions of law," which the agency is free to decide in one way or another within the bounds of reason (" discretion "). This order of idea has been applied not only to the general run of actions reviewed by certiorari but also the specific statutory reviews regardless of the particular phrasing of the statute. In situations where there has been no hearing review is generally by mandamus: in these cases too, very much the same concepts are used.

During the late thirties and early forties there developed something of a crisis concerning judicial review. The courts had been under very severe attack for at least fifteen years. It was claimed, and with reason, that in their hostility to administrative action the courts were substituting their judgment on questions of fact and narrowing excessively the area of discretion. This attack had its effect. The galvanic political power of the New Deal, the accesssion to the bench of younger men drawn in part from the ranks of " liberals " and New Dealers, the strong lead given by the Supreme Court: all these worked a reaction. This led in time to decisions which were now strongly attacked from the " right." It was claimed that the Supreme Court was " rubber-stamping " (and compelling the lower courts to rubber-stamp) administrative findings which were the product not of evidence but administrative bias. It was said that in determining whether evidence was " substantial " the court abstracted from the context of the record the evidence in support of the finding, so that the test of substantiality, of " reasonable " support, became formal rather than real. The court, too, went very far in giving expression to the view that even the rulings of law of the administration would be controlling if they were " reasonable." Yet if the whole corpus of decisions was somewhat more dispassionately surveyed, this process of " abdication " probably had not gone quite so far. And even before 1946 (the APA) our courts sensitive to the criticism and alert to keep a balance had begun to reassert the more conventional positions.

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[12] *Degge* v. *Hitchcock*, 229 U.S. 162 (1913) (order of Postmaster-General barring use of mails after hearing had an " administrative quality " ; it was not a " judgment " and thus not subject to " appeal writ of error or certiorari." One can only wonder whether so grossly flagrant a misreading of history was deliberate.

The principal contribution of the APA was to insist that the " substantiality " of evidence be determined on " the whole record." [13] Mr. Justice Frankfurter, writing the definitive decision [14] on this provision, has told us that whether or not this works a change in the basic principle of review it does manifest a Congressional " mood " that the substantiality of evidence be realistically appraised with a view to the doing of real rather than formal justice.[15] And in performing this task the judges are not to be overawed by the putative " expertness " of the administrator even though they must respect it. It is too early to determine what change this has brought in the degree of review: whether it has gone too far or not far enough. On a casual view it is working well: most judges it would seem are conscientiously attempting to hold a balance between the valid area of expertness and the demand that findings of fact should not be the mere registration of administrative predeliction.

There are words in the APA to the effect that the " reviewing court shall decide all relevant questions of law." [16] It has been argued that this was intended to reverse those decisions of the forties which permitted agencies to adopt " rules," " policies," " formulas "—I would face the fact that they function as rules of law—if " reasonable." It is true that the courts under the APA and even before have regained the sense of their freedom of action in this area, if it be assumed that these decisions manifested a compulsion to refrain from entering this area of law and policy. But to go further than this, to hold that because an administrative decision implies or expresses a " rule " it must *ipso facto* be judged by the court to be the one and only right rule or *per contra*, would be to reverse centuries of administrative history. For we must admit that under the capacious umbrella of " discretion " administrators have been formulating " policies " (or what you will) without benefit of positive judicial affirmation. Viewed thus, the agency is free to test, to reframe, to abandon a policy, as it would not be free to do if the policy were frozen into a " rule of law." A court does not thereby abdicate as the ultimate arbiter of the law. It may always reject the rule as " unreasonable "; and it may, if it is of that opinion, hold that the agency policy is " wrong " (however " reasonable ") because it, the court, reads the statutes or the general law in a different way.[17] I do not believe that the APA can be or should be taken to change this general situation: the evidence accumulates that judicial review of law and discretion proceeds today much as it did before the APA. The court, however, is somewhat more cautious in its language; it has abandoned the offensive phrases seeming to attest judicial abdication of the law-deciding function.

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[13] § 10 (e), (6).

[14] *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474 (1951).

[15] I have reviewed the present status and theory of review of questions of fact in " Judicial Review: Question of Fact," 69 *Harvard Law Review* 1020 (1956).

[16] § 10 (e).

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[17] I have reviewed the status and theory of this matter in " Judicial Review: Question of Law," 69 *Harvard Law Review* 239 (1955).

# THE ABUSE OF STATUTORY POWERS

S. A. DE SMITH

" No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud." Fraud " vitiates all transactions known to the law of however high a degree of solemnity." [1] These general principles have long conditioned the attitude of the courts towards the interpretation of discretionary powers in public law. Even where powers have been conferred in " subjective " terms, permitting an authority to take a prescribed course of action if it " is satisfied " that certain conditions exist or that it is necessary in the public interest, the courts have repeatedly affirmed that the powers must be exercised in good faith [2]; and fraud is an illustration of bad faith. Moreover, formulae expressly taking away the right to apply for certiorari to quash the decisions of a tribunal have been held not to cover cases where manifest fraud is alleged.[3]

The jurisdiction of the courts to examine the bona fides of administrative action is not often invoked, but its value is so obvious that one would expect it to be effectively excluded only by very clear words and in exceptional circumstances.[4] The decision of the House of Lords in *Smith* v. *East Elloe Rural District Council* [5] shows that this jurisdiction may be excluded by a form of words that appears in a number of important recent statutes affecting individual rights. In the present article an attempt will be made, first, to consider the decision in the *East Elloe* case, and secondly, to consider the meaning of bad faith and associated concepts bearing upon the abuse of statutory powers.

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[*] The Author is Reader in Public Law at the London School of Economics and Political Science, University of London.

[1] *Lazarus Estates, Ltd.* v. *Beasley* [1956] 2 W.L.R. 502 at pp. 508 (*per* Denning L.J.) and 516 (*per* Parker L.J.). In this case the Court of Appeal held (Morris L.J. dissenting) that the provisions of the Housing Repairs and Rents Act, 1954, prescribing a period of twenty-eight days during which the validity of a landlord's declaration as to the value of repairs carried out by him could be challenged, did not cover a situation in which the tenant alleged that the landlord's declaration was fraudulent.

[2] See de Smith, " Statutory Restriction of Judicial Review," (1955) 18 M.L.R. 575 at pp. 588–591.

[3] *R.* v. *Gillyard* (1848) 12 Q.B. 527; *Colonial Bank of Australasia, Ltd.* v. *Willan* (1874) L.R. 5 P.C. 417.

[4] For a discussion of some situations in which power to review bona fides may be ousted, see de Smith, *loc. cit.*, at pp. 585–586.

[5] [1956] 2 W.L.R. 888, affirming [1955] 1 W.L.R. 380 (C.A.). See also *Uttoxeter R.D.C.* v. *Clarke* [1952] 1 All E.R. 1318, at p. 1321.

### THE EAST ELLOE CASE

In 1940 the council requisitioned the plaintiff's residence for housing purposes. In 1947 the premises became vacant. In 1948 a compulsory purchase order was made and confirmed in respect of the premises, but they were not de-requisitioned until 1951, when the council entered upon the land. In 1952 the plaintiff recovered £850 damages in the Queen's Bench Division in an action against the council for trespass.[6] In 1954 she instituted proceedings against the council, the clerk to the council and the Ministries concerned, claiming damages and various declarations to the effect that the compulsory purchase order had been procured, made and confirmed wrongfully and in bad faith. The defendants applied to have the writ and all subsequent proceedings set aside on the ground that the courts had no jurisdiction to grant the relief sought. The House of Lords, by a majority of three to two (Viscount Simonds, Lord Morton of Henryton and Lord Radcliffe; Lord Reid and Lord Somervell of Harrow dissenting) upheld this contention in so far as it related to the proceedings against the council and the Ministries.

The jurisdiction of the courts was held to have been ousted by the effect of paragraphs 15 and 16 of Part IV of the First Schedule to the Acquisition of Land (Authorisation Procedure) Act, 1946. Paragraph 15 provides that any person aggrieved by a compulsory purchase order may question its validity by making an application to the High Court within six weeks after publication of notice of the making or confirmation thereof, on the ground that the authorisation of the compulsory purchase " is not empowered to be granted " under the relevant Act, or that any requirement of the 1946 Act has not been complied with. Paragraph 16 provides: " Subject to the provisions of the last foregoing paragraph, a compulsory purchase order . . . shall not . . . be questioned in any legal proceedings whatsoever. . . ." For the appellant it was argued that the grounds set out in paragraph 15 did not include a challenge to the bona fides of the authority making or confirming the order; that a literal interpretation of paragraph 16 would therefore preclude any possibility of challenging bona fides; that it was inconceivable that Parliament could have intended this result; and that the general words of paragraph 16 should therefore be construed as applying only to orders made in good faith. Lord Reid accepted this line of argument, and Lord Somervell arrived at the same conclusion by a different route.[6a] In their Lordships' view any inconvenience that might follow if the validity of orders were to be reopened years after the event would be outweighed by the undesirability of " hushing up a scandal " or by the greater inconvenience of denying a person defrauded any remedy in the courts.[7] Both were of the opinion that the words " not empowered to be granted " in paragraph 15 referred to *ultra vires* in a narrow sense; Lord Reid thought that they excluded misuse of powers in good faith as well as in bad faith.[8] Viscount Simonds, Lord Morton and Lord Radcliffe, on the other hand, preferred to interpret paragraph 16 literally. Parliament should be understood to have meant what it had said; and although its words were general, general words might well be " the most apt to produce a corresponding general result." [9] It could not be predicated of an order good on its face that it had been made in bad faith, and was therefore a nullity, until its validity had been tested in the courts; but Parliament had forbidden recourse to the courts for that purpose once the six weeks' period had expired. The unanimity of their Lordships did not, however, extend to paragraph 15. Lord Morton was of the same opinion as Lords Reid and Somervell, that the words " not empowered to be granted " did not include a challenge alleging bad faith; Lord Radcliffe was of the contrary opinion, holding that the words covered all the recognised grounds of invalidity for abuse of power; Viscount Simonds refrained from expressing a final opinion on the matter, but inclined to the same view as Lord Radcliffe.[10]

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[6] This case is unreported. The statement of facts given in the text is taken from a report of the case now under discussion; see [1955] 1 W.L.R. 380.

[6a] His Lordship was of the opinion that paragraph 15 did not exhaust the permissible grounds of challenge within the six weeks' period, that a challenge to bona fides could be made in another form of proceedings within that period and that paragraph 16 did not affect this right of action.

Thus the literal approach to statutory interpretation prevailed, as it has prevailed in a number of other recent cases before the House of Lords and the Judicial Committee of the Privy Council. The interpretation given to paragraph 16 may also have been a correct reflection of the intentions of Parliament, or at least of the draftsman. But it is obviously unsatisfactory that the six weeks' period for challenging an order should have to be rigidly enforced in every case. A person aggrieved by an order or certificate affecting his property may not have the opportunity to discover the circumstances that taint it with invalidity until after the six weeks have expired.[11] The courts should have a discretion to extend the period in cases of hardship, just as they have a discretion (which is sparingly exercised) to allow an application for an order of certiorari to be brought out of time.[12] It is unlikely that such a discretion would have been exercised in favour of Mrs. Smith, for she had instituted the proceedings nearly six years after the event and in the meantime council houses had been built on the land.

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[7] At pp. 908 (*per* Lord Reid), 914 (*per* Lord Somervell).

[8] At pp. 904–906.

[9] At p. 909 (*per* Lord Radcliffe).

[10] At pp. 898–899 (*per* Lord Morton), 910 (*per* Lord Radcliffe), 894–895 (*per* Viscount Simonds). Lord Morton, like Lord Reid (at p. 904), saw significance in the fact that s. 162 (1) of the Local Government Act, 1933, which was the ancestor of paragraph 15, had permitted the " validity " of compulsory purchase orders to be challenged, whereas paragraph 15 specified particular grounds of challenge. But see p. 236, *post*, for comments on the interpretation of formulae similar to paragraph 15.

[11] *Cf. Woollett* v. *Minister of Agriculture and Fisheries* [1955] 1 Q.B. 103, where it was held that even if the certificate given in that case had been a nullity, paragraph 16 would have precluded challenge after six weeks although the applicant could not have known the facts vitiating the certificate.

The *East Elloe* case is a binding precedent only on the interpretation of paragraph 16. It does not conclusively decide what are the grounds for challenging a compulsory purchase order that are permitted by paragraph 15. An answer that may be indicated by the speeches of their Lordships is, however, disturbing. The majority and Lord Reid held that the grounds for challenge within the six weeks' period formed a complete code. Lord Morton, in a considered dictum, said that a challenge to bona fides fell outside the ambit of the paragraph; the minority held (as indeed they were obliged to hold, in order to support their interpretation of paragraph 16) that the paragraph did not cover a challenge to bona fides. One is conscious of the dangers of the familiar fallacy that two and one make three [12a]; yet a doubt must now arise whether it is permissible to impugn a compulsory purchase order within the statutory period for bad faith or, for that matter, any reason other than excess of power in the narrowest sense or breach of procedural requirements. What applies to the 1946 Act must apply equally to the interpretation of Acts in which power has been given to challenge the validity of orders on the ground that they are " not within the powers of " the Act or that any requirement of the Act has not been complied with [13]; clearly, an order that is " not within the powers of " an Act means one that is " not empowered to be made " by the Act. But such words have been held to be wide enough to admit of challenges based on the grounds that the rules of natural justice have been broken.[14] Moreover, in *Earl Fitzwilliam's* case [15] the applicants contended that the order had been made for an improper purpose, and it was at no time suggested that this was an inadmissible ground of challenge. *A fortiori*, an allegation that an order was made in bad faith ought to be held to fall within the permitted grounds. The fact that bad faith has occasionally been classified as a head of invalidity separate from excess of power should be regarded as irrelevant; dicta can be marshalled on both sides. Nor is it relevant that evidence of bad faith is unlikely to be forthcoming until long after the statutory period has expired; if the evidence is available, it is hardly for the courts to prevent a person aggrieved from making use of it unless they are driven to such a position by an unambiguously worded Act of Parliament.

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[12] R.S.C., Ord. 59, r. 4 (2); Ord. 64, r. 7.

[12a] Especially as one of the three (Lord Somervell) took the view that bona fides could be challenged independently of paragraph 15 (see note 6a, *ante*). But he was alone in his view that paragraph 15 did not exhaust the permissible grounds of challenge.

[13] See esp. Housing Act, 1930, s. 11 (3) (repd.); Housing Act, 1936, Sch. II, para. 2; Town and Country Planning Act, 1944, s. 16; Town and Country Planning Act, 1947, s. 11 (2), Sched. VI. In these Acts, as in the 1946 Act, an applicant alleging that a requirement of the Act has not been complied with must show that he has been substantially prejudiced as a result thereof.

[14] Whether this allegation falls within the first ground of challenge (" not within the powers of the Act ") or the second (non-compliance with a requirement of the Act) is not settled: for the former view, see *Errington* v. *Minister of Health* [1935] 1 K.B. 249 at p. 268, *Darlassis* v. *Minister of Education* (1954) 118 J.P. 452 at p. 466; for the latter view, see *Errington's* case, at pp. 279, 282.

[15] *Earl Fitzwilliam's Wentworth Estates Co.* v. *Minister of Town and Country Planning* [1951] 1 K.B. 203; [1951] 2 K.B. 284 (C.A.); [1952] A.C. 362 (H.L.).

### MISUSE OF POWERS IN BAD FAITH AND IN GOOD FAITH

A discretionary power may be exercised invalidly if its repository exercises it for an improper purpose or on the basis of irrelevant considerations or in disregard of relevant considerations or with gross unreasonableness. These several forms of abuse of discretion " overlap to a very great extent " and " run into one another," [16] and it is often found to be impossible to separate them analytically.[17] A discretionary power may be abused in good faith or in bad faith. Although there are several judicial dicta, in the *East Elloe* case and elsewhere, which refer to bad faith as a wholly distinct ground of invalidity, it is more satisfactory to regard it as a quality which may bring the exercise of a power within the ambit of one of the recognised categories; the relevant category will usually be the exercise of a power for an improper purpose.

The concept of bad faith eludes precise definition,[18] but in relation to the exercise of statutory powers it may be said to comprise dishonesty and malice. A power is exercised dishonestly if its repository intends to achieve an object other than that for which he believes the power to have been conferred. His intention may be to promote another public interest or his own private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise. In judicial proceedings, the rules of natural justice disqualify an adjudicator from acting if his personal animosity towards a party gives rise to a real likelihood of bias.[19]

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[16] *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223 at p. 229.

[17] See, *e.g.*, *Roberts* v. *Hopwood* [1925] A.C. 578 (the *Poplar* case).

[18] One reason for this may be, as Lord Somervell suggested in the *East Elloe* case (*ante*), at p. 912, that its effects have " remained mainly in the region of hypothetical cases."

[19] *R.* (*Donoghue*) v. *Cork County JJ.* [1910] 2 I.R. 271; *R.* (*Kingston*) v. *Cork County JJ.* [1910] 2 Ir.R. 658; *R.* v. *Clare County JJ.* [1918] 2 Ir.R. 116; *Law* v. *Chartered Institute of Patent Agents* [1919] 2 Ch. 276; *R.* v. *Handley* (1921) 61 D.L.R. 656; *Re " Catalina "* and *" Norma "* (1938) 61 Ll.L.R. 360.

If a discretionary power has been abused it is generally immaterial whether its repository was acting in good faith or in bad faith. There are, however, certain rules that apply only where bad faith is alleged. They appear to be the following: —

(1) Bad faith should be expressly pleaded and be supported by specific allegations of fact.[20]

(2) If the good faith of a party to proceedings is impugned on the ground that his evidence given on affidavit is false, leave should be sought to cross-examine the deponent.[1]

(3) Bad faith cannot be imputed to the Crown; but it may be imputed to Ministers of the Crown, and an act done by the Crown may be challenged on the ground that it was done in good faith but for an unauthorised purpose.[2]

(4) In certain circumstances acts done in bad faith may give rise to tortious liability which would not have attached if they had been done in good faith.[3]

(5) Where the courts have no jurisdiction to determine whether the prescribed purposes have in fact been pursued, because the relationship between the subject-matter of the power to be exercised and those purposes is placed within the sole discretion of the competent authority, they still retain jurisdiction to determine whether that authority has in good faith endeavoured to act in accordance with the prescribed purposes.[4]

It may also be assumed that the burden of proving bad faith will be exceptionally heavy.

## USE OF POWER FOR UNAUTHORISED PURPOSES

If a power granted for one purpose is exercised for a different purpose, that power has not been validly exercised. In administrative law[5] this elementary proposition was first laid down in nineteenth-century cases concerning the exercise of powers of compulsory acquisition.

> " When persons embarking in great undertakings for the accomplishment of which those engaged in them have received

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[20] *Demetriades* v. *Glasgow Corporation* [1951] 1 All E.R. 457 at pp. 460, 461; *East Elloe* case (*ante*), at pp. 912–913.

[1] *Re Smith & Fawcett, Ltd.* [1942] Ch. 304 at p. 308; *Franklin* v. *Minister of Town and Country Planning* [1947] 1 All E.R. 612 at p. 616. See R.S.C., Ord. 38, r. 1; Ord. 59, r. 47.

[2] See *R.* v. *Halliday* [1917] A.C. 260; *Hudson's Bay Co.* v. *Maclay* (1920) 36 T.L.R. 469.

[3] See p. 246, *post*.

[4] See de Smith, *loc. cit.*, at pp. 589–590; Griffith & Street, *Principles of Administrative Law*, pp. 215–216.

[5] The doctrine of a fraud upon a power is, of course, well known in equity.

> authority from the legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorised cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers." [6]

An expression of judicial solicitude for private property rights [7] has been enlarged into a fundamental principle of English administrative law. Most of the reported cases deal with the misapplication of administrative powers by local authorities, though the same general principle governs the exercise of subordinate legislative powers.[8]

Thus, a local authority empowered to acquire property for the purpose of widening a street or redeveloping an urban area, acquires a man's property ostensibly for the permitted purpose but in reality for the purpose of reselling it at a profit,[9] or preventing him from reaping the benefit of the expected increment in land values.[10] An authority, purporting to exercise powers of compulsory acquisition for the purpose of widening streets, proposes to widen a street only to a minute extent; its true purpose is to obtain thereby a consequential power to alter the street level.[11] An authority empowered to dismiss schoolteachers on educational grounds dismisses them for reasons of economy.[12] An authority has power to raise the salaries of its employees in proportion to an increase in their duties; it seizes the opportunity to grant an employee an increase that is unrelated to the changes in his duties.[13] A police authority has power to call a police pensioner for a medical examination in order to satisfy itself that his incapacity continues; it calls its former chief constable, who is living abroad, for two examinations within three months, and cancels his pension when he fails to appear for the second examination; its ulterior motive in sending the second summons was to facilitate the execution of a warrant of arrest issued against him by the Bankruptcy Court.[14]

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[6] *Galloway* v. *London Corporation* (1866) L.R. 1 H.L. 34, at p. 43.

[7] For other early dicta, see *Dodd* v. *Salisbury & Yeovil Ry.* (1859) 1 Giff. 158; *Stockton & Darlington Ry.* v. *Brown* (1860) 9 H.L.C. 246 at pp. 254, 256; *Biddulph* v. *Vestry of St. Georges, Hanover Square* (1863) 33 L.J.Ch. 411 at p. 417; *Hawley* v. *Steele* (1877) 6 Ch.D. 521 at pp. 527–529. See also *Marshall Shipping Co.* v. *R.* (1925) 41 T.L.R. 285: "You can never beat into the heads of people exercising bureaucratic authority that they must exercise their powers singly, and not for collateral objects."

[8] For by-laws, see, *e.g.*, *Scott* v. *Glasgow Corporation* [1899] A.C. 470, at p. 492; *Robert Baird, Ltd.* v. *Glasgow Corporation* [1936] A.C. 32 at p. 42. There are many instances of challenges to departmental legislation on this ground; see generally, *Arthur Yates & Co. Pty., Ltd.* v. *Vegetable Seeds Committee* (1945) 72 C.L.R. 37.

[9] *Gard* v. *Commissioners of Sewers for the City of London* (1885) 28 Ch.D. 486; *Donaldson* v. *South Shields Corporation* [1899] W.N. 6; *Fernley* v. *Limehouse Board of Works* (1899) 68 L.J.Ch. 344; *Denman (J. L.) & Co.* v. *Westminster Corporation* [1906] 1 Ch. 464 at p. 475; *R.* v. *Minister of Health, ex p. Davis* [1929] 1 K.B. 619 at p. 624.

[10] *Sydney Municipal Council* v. *Campbell* [1925] A.C. 338.

[11] *Lynch* v. *Commissioners of Sewers for the City of London* (1886) 32 Ch.D. 72.

[12] *Hanson* v. *Radcliffe U.D.C.* [1922] 2 Ch. 490; *Sadler* v. *Sheffield Corporation* [1924] 1 Ch. 483. See also *Smith* v. *McNally* [1912] 1 Ch. 816 at pp. 825–826; *Martin* v. *Eccles Corporation* [1919] 1 Ch. 387 at p. 400 ("grounds connected with the giving of religious instruction"). Contrast *Price* v. *Rhondda U.D.C.* [1923] 2 Ch. 377; *Short* v. *Poole Corporation* [1926] Ch. 66.

[13] *R.* v. *Local Government Board for Ireland* [1902] 2 Ir.R. 349.

In all these cases the statutory powers held to have been misapplied had been defined with reference to purpose. It has been said that "if a power to perform an administrative act is conferred with no reference to purpose, no inquiry into purpose (in the sense of result or consequence desired or intended to be achieved) is relevant."[15] This may be correct in some contexts, but it is an overstatement. The courts have not always regarded Parliament's omission to make the permitted purposes explicit as a justification for violating what they conceive to be the spirit of the enacted law; though they tend to be circumspect in narrowing down the range of permissible purposes. A local authority, which had power to refer contracts of letting to a rent tribunal for the tribunal to fix reasonable rents, was held to have misused its power and to have failed to make a valid reference when it referred most of the tenancies in a large block of flats to the tribunal without having consulted the wishes of the tenants beforehand; the power to refer was interpreted by the courts as having been conferred for the purpose of protecting tenants who might fear the consequences of taking the initiative themselves, and not for the purpose of enabling the tribunal to act as a general rent-fixing agency.[16] The same principle—that powers may not be used for impliedly unauthorised purposes, is traceable in liquor licensing law, where a refusal by justices to renew a licence unless the applicant agreed to make a financial payment was held to be an improper exercise of discretion.[17] A power to regulate can no more be used for the purpose of augmenting public funds than a power to award costs can be used for the purpose of imposing a fine.[18]

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[14] *R.* v. *Lord Leigh* [1897] 1 Q.B. 132.

[15] *Arthur Yates & Co. Pty., Ltd.* v. *Vegetable Seeds Committee* (1945) 72 C.L.R. 37 at p. 68, *per* Latham C.J.

[16] *R.* v. *Paddington & St. Marylebone Rent Tribunal, ex p. Bell London & Provincial Properties, Ltd.* [1949] 1 K.B. 666.

[17] *R.* v. *Bowman* [1898] 1 Q.B. 663. See also *R.* v. *Shann* [1910] 2 K.B. 418 at p. 434; *Roncarelli* v. *Duplessis* [1952] 1 D.L.R. 680 (arbitrary revocation of liquor licence, on instructions of Premier of Quebec, because holder had regularly furnished bail for arrested adherents of Jehovah's Witnesses; see E.C.S. Wade, Comment, 29 *Can. Bar Rev.* 665). These are often classified as cases where the exercise of discretion was vitiated by the consideration of extraneous factors.

[18] *R.* v. *Highgate JJ., ex p. Petrou* [1954] 1 W.L.R. 485. But if a tribunal has given reasons for its decision, the courts will not receive evidence to show that those reasons were not the true ones; see p. 246, *post.*

In some situations the motive for or purpose of the exercise of a power may be wholly irrelevant. Thus, in fixing the wages and salaries of its employees a local authority is restricted by the rule that they must not be so unreasonable in amount as to be contrary to law; but provided that the payments are "reasonable" in this sense, the considerations that lead the authority to fix upon any particular sum are immaterial.[19] The membership of the class of case to which this belongs should not be gratuitously enlarged. However, a dictum in a modern Housing Act case[20] has unfortunate implications. A local authority declared an area that was unfit for human habitation to be a clearance area, and obtained a compulsory purchase order. The validity of the order was challenged by the owners of buildings in the area, who claimed that the local authority ought to have followed the alternative course of demolishing the buildings. The Court of Appeal held that the local authority had an unfettered discretion in its choice of method,[1] and MacKinnon L.J. observed that even had the property owners succeeded in establishing that the local authority had adopted the method of compulsory purchase in order to be able to resell the land to the owners (who wished to develop it) at a high price, that would not have affected the validity of the order. Yet there seems to be no reason why a court should have been incompetent to consider the legal effect of improper motives in this context,[2] though it might well have reached the conclusion that, notwithstanding their presence, the purpose for which the power had been granted had been substantially fulfilled. A similar legal problem would arise if an authority needing land for housing purposes made a compulsory purchase order in respect of *A*'s land in preference to *B*'s or *C*'s because the authority disliked *A*'s political views. In such cases a further difficult legal problem, to which no certain answer can be given, would arise: whether the bad faith of the authority that made the order in the first instance would infect with invalidity the confirmation of the order by a Minister acting in good faith.

We now take hold of a legal porcupine which bristles with difficulties as soon as it is touched. In a case where the actor has sought to achieve unauthorised as well as authorised purposes, what test should be applied to determine the validity of his act? There are at least five tests that a court might apply in order to answer this question, and the choice of one test in preference to another may materially affect the decision of a case. The following are the tests that may be applied:

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[19] *Roberts* v. *Hopwood* [1925] A.C. 578 at p. 604. In *re Decision of Walker* [1944] K.B. 644 at pp. 649, 650.

[20] *Robins (E.) & Sons* v. *Minister of Health* [1939] 1 K.B. 520, at p. 537; *cf. Merrick* v. *Liverpool Corporation* [1910] 2 Ch. 449, at p. 463.

[1] Following *Re Greenwich (Prince of Orange Lane) Housing Order, 1936* (1937) 157 L.T. 67.

[2] Though the effect of the *East Elloe* case (*ante*) has thrown doubt upon the jurisdiction of the courts to entertain allegations of *mala fides* on an application to quash a compulsory purchase order.

(1) What was the *true purpose* for which the power was exercised? If the actor has in truth used his power for the purpose for which it was conferred, it is immaterial that he was thus enabled to achieve a subsidiary object. Thus, if a power to construct underground public conveniences is exercised in such a way as to provide a subway that can be used by pedestrians who do not wish to take advantage of the facilities proffered, the power has been validly exercised unless the construction of the conveniences can be shown to have been a colourable device adopted in order to enable a subway to be built.[3] A local authority empowered to spend money upon altering and repairing streets " as and when required," acts lawfully in resurfacing a road that is in fact in need of repair, although the immediate occasion for carrying out the work is the hope of attracting an automobile club to hold racing trials upon it.[4]

(2) What was the *dominant* purpose for which the power was exercised? If the actor pursues two or more purposes where only one is expressly or impliedly permitted, the legality of the act is determined by reference to the dominant purpose. This test, based on an analogy with the law of tortious conspiracy,[5] was adopted by Denning L.J. in a recent case as if it were of general application in relation to the abuse of statutory discretions.[6] In substance it may often prove to be nothing more than a better verbal formulation of the " true purpose " test. Where several purposes co-exist, attempts to single out the " true " purpose have an air of unreality.[7] If, of course, the avowed purpose is shown to be a mere sham, the " true purpose " test can readily be applied.

(3) Would the power still have been exercised if the actor had not desired concurrently to achieve an illicit purpose? This test was recently applied by the High Court of Australia[8]; but it has the serious disadvantage of requiring the court to embark upon a course of speculation for which it is ill-equipped.

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[3] *Westminster Corporation* v. *L. & N.W. Ry. Co.* [1905] A.C. 426.

[4] *R.* v. *Brighton Corporation, ex p. Shoosmith* (1907) 96 L.T. 762; Public Health Act, 1875, s. 149.

[5] *Crofter Hand Woven Harris Tweed Co.* v. *Veitch* [1942] A.C. 435.

[6] *Earl Fitzwilliam's Wentworth Estates Co.* v. *Minister of Town and Country Planning* [1951] 2 K.B. 284, at p. 307 (in a dissenting judgment). The House of Lords did not give any ruling on this point on appeal ([1952] A.C. 362).

[7] An inquiry into true purpose forms the basis for determining the " pith and substance " of impugned legislation in matters affecting the distribution of powers in Canadian constitutional law. But in such an inquiry the rules for interpretation of statutes apply; the court does not have recourse to legislative debates and other extrinsic aids, and cannot therefore effectively weigh the motives of the legislators.

[8] *Thompson* v. *Randwick Municipal Council* (1950) 81 C.L.R. 87, at p. 106.

(4) Was any one of the purposes pursued an authorised purpose? If so, the presence of concurrent illicit purposes does not affect the validity of the act. This test appears to have been applied in only one English case[9]; but although it may seem to be inferior to the "dominant purpose" test, it has the advantage of avoiding the need for attempting to measure the relative weights of various motives, and it escapes the unreality of the "true purpose" test. It is also significant that it is the test employed in French[10] and Italian[11] administrative law. It is capable of being expressed in another form: if the practical effect of the exercise of a power substantially fulfils the statutory purpose, and was intended by the actor to do so, it is immaterial that the actor had other objects in view that he ought not to have entertained.

(5) Was any one of the purposes pursued an unauthorised purpose? If so, and if the unauthorised purpose has materially influenced the actor's conduct, the power has been invalidly exercised because irrelevant considerations have been taken into account. The effect of applying this test is directly opposed to that produced by the preceding test.[12] This is a curious state of affairs, for the concepts of improper purpose and irrelevancy are intimately related and are often analytically indistinguishable. It is not easy to explain why the possibility of conflict between them has never been openly admitted. One reason may be that the courts have seldom analysed the problems that arise when the motives for exercising a power are mixed; they have generally been content to ascertain to their own satisfaction what was the true purpose, distinguishing that purpose from a colourable device or a subsidiary object. Another reason may be that allegations that irrelevant considerations have been taken into account are usually directed against licensing authorities, and it is difficult to show that the licensing power has been used to effect a wholly improper purpose.

## MOTIVE AND PURPOSE

We have not attempted to draw distinctions between the legal relevancy of motives and purposes. To be actuated by ulterior motives is to seek to promote ulterior purposes.[13] Yet it is sometimes said that the law is concerned with purposes but not with motives. This view is untenable in so far as motive and purpose share a common area of meaning. Both are capable of meaning a conscious desire to attain a specific end, or the end that is desired. In these senses an improper motive or purpose may, if it affects the quality of the act, have the effect of rendering invalid what is done. Motive may also be used to mean a primarily subjective phenomenon—the complex of psychological and emotional factors that motivate the actor and explain his conduct. It is true that the law is not, as a rule, concerned with states of mind expressed in general terms (benevolence or malevolence, arrogance or timidity); but in so far as states of mind do in fact influence the actor's conduct by causing him consciously to direct his acts towards the attainment of a specific end they may well be indirectly relevant in law.

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[9] *Earl Fitzwilliam's Case* [1951] 1 K.B. 203, at pp. 217–219, *per* Birkett J. His Lordship's views differed from those of Denning L.J. (*ante*), but were not otherwise considered on appeal.

[10] Jèze in (1944) *Revue de Droit Public*, at p. 60; Duez and Debeyre, *Traité de Droit Administratif*, p. 393.

[11] Galeotti, *Judicial Control of Public Authorities in England and in Italy*, pp. 114–115.

[12] See, *e.g.*, *Sadler* v. *Sheffield Corporation* [1924] 1 Ch. 483, at pp. 504, 505. Conflict may also arise if the "dominant purpose" test is applied.

## Matters of Evidence and Proof

The difficulty of establishing that a public authority has used its powers for an improper purpose lies not in the inadequacy of the substantive law of judicial review—the scope of review is, in most respects, at least as wide as in the major Continental systems [14]—but in obtaining sufficient evidence of impropriety. The problem does not arise if in the pleadings, speeches by counsel, affidavits or oral evidence the authority admits to having pursued the illicit purpose, or if that purpose is disclosed on the face of a reasoned decision or explanation issued by it. But an authority that has intended to achieve an ulterior object will seldom be so forthcoming; and the absence of any general duty to give reasons for decisions, the traditional sacrosanctity of departmental files and the ready exercise of the power to assert Crown privilege for official documents, make it peculiarly difficult to probe into the motives of the Administration.[15] The burden of proving abuse of power rests upon the party impugning the act, and it is not lightly discharged, especially if bad faith is alleged. However, the failure of the public authority to adduce any evidence in reply from which it could reasonably be inferred that the avowed purpose had in fact been pursued may lead a court to the conclusion that they had not been genuinely pursued.[16] It is also open to a court to deduce the true intentions of the authority from the practical consequences that flow, or may reasonably be expected to flow, from its conduct.[17]

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[13] For discussion of the relationship between motives and purposes, see Treves, "Administrative Discretion and Judicial Control" (1947) 10 M.L.R. 276, at p. 287; Galeotti, *op. cit.*, at pp. 123–124; Stone, *The Province and Function of Law*, pp. 622–625; *Crofter Hand Woven Harris Tweed Co.* v. *Veitch* [1942] A.C. 435, at pp. 452–453, 469, 478; *Earl Fitzwilliam's Case* [1951] 2 K.B. 284, at p. 307, *per* Denning L.J. On motive and intention, see Salmond, *Jurisprudence*, 10th ed., pp. 382–384; Williams, *Criminal Law : The General Part*, pp. 41–44.

[14] For the French concept of *détournement de pouvoir*, see Waline, *Manuel Elémentaire de Droit Administratif*, 6th ed., pp. 131 *et seq.*; Duez and Debeyre, *op. cit.*, pp. 391 *et seq.*; Jèze in *Revue de Droit Public*, at pp. 58 *et seq.* For the Italian concept of *sviamento di potere*, see Galeotti, *op. cit.*, pp. 109 *et seq.*

[15] Contrast the wider powers of inquiry exercisable by the administrative courts in France and Italy (*op. cit.*, note 14, *supra*). In Danish administrative law comparable powers are exercised by the ordinary courts; see Andersen and Christensen, *Conseil d'Etat : Livre Jubilaire*, pp. 598–599.

A special difficulty arises in ascertaining the motives of an authority comprising a number of individuals, who may be animated by various motives in agreeing to an act or decision. At meetings of local authorities where decisions whether or not to grant licences and permits are taken, " there are probably few debates in which some one does not suggest as a ground for decision something that is not a proper ground; and to say that, because somebody in debate has put forward an improper ground, the decision ought to be set aside as being founded on that particular ground is wrong.[18] This is not to say that evidence of such statements is inadmissible; in some cases it may be decisive in establishing that the authority was actuated by an improper motive or irrelevant considerations in reaching its decision [19]; but it must be viewed with caution. It is not clear whether such evidence would be admissible to impugn the validity of a by-law made by a local authority.[20] Nor is it clear whether individual members of a special administrative tribunal can ever be called upon to give oral evidence of the reasons that led them to arrive at a decision.[1] Public policy would seem to require that such evidence should be excluded unless wilful misconduct is alleged.[2] If the tribunal has given reasons for its decision, the courts will not admit affidavit evidence designed to show that the true reasons were other than those stated by the tribunal.[3]

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[16] *Gard* v. *Commissioners of Sewers of the City of London* (1885) 28 Ch.D. 486, at p. 511; *Lynch* v. *Ibid.* (1886) 32 Ch.D. 72, at p. 89; *Marquess of Clanricarde* v. *Congested Districts Board for Ireland* (1915) 79 J.P. 481; *R.* v. *Halliday* [1917] A.C. 260, at p. 272; *Hudson's Bay Co.* v. *Maclay* (1920) 36 T.L.R. 469, at p. 476. But Continental courts are in general far readier to draw unfavourable inferences from the silence of the Administration.

[17] *Cf. Att.-Gen. for Alberta* v. *Att.-Gen. for Canada* [1939] A.C. 117. For statutory definitions of purpose with reference to probable effect in tax law, see Wheatcroft, " The Attitude of the Legislature and the Courts to Tax Avoidance " (1955) 18 M.L.R. 209, at pp. 223–225.

[18] *R.* v. *L.C.C.* [1915] 2 K.B. 466, at pp. 490–491, *per* Pickford L.J.; see also *R.* v. *Brighton Corporation, ex p. Thomas Tilling, Ltd.* (1916) 85 L.J.K.B. 1552, at p. 1556 (citing dictum in *R.* v. *Blackpool Corporation* (1899, unreported); *Arthur Yates & Co. Pty. Ltd.* v. *Vegetable Seeds Committee* (1945) 72 C.L.R. 37, at pp. 82–84, *per* Dixon J. And *cf. Allcroft* v. *Bishop of London* [1891] A.C. 666, at p. 681, *per* Lord Herschell: " If a dozen persons told to consider all the circumstances of a given case, and to form their opinion thereon, were required to state what considerations they had taken into account, I do not believe that any two of them would precisely agree in their statement."

[19] As in *Sydney Municipal Council* v. *Campbell* [1925] A.C. 388, and *R.* v. *Brighton Corporation* (*supra*).

[20] See *Arthur Yates'* case (*supra*) at pp. 65–66, 82–83; and *Robert Baird, Ltd.* v. *Glasgow Corporation* [1936] A.C. 32, at pp. 42–43.

[1] In general such evidence is inadmissible: *Ward* v. *Shell-Mex & B.P., Ltd.* [1951] 2 All E.R. 904 (applying principles governing arbitrators).

### LIABILITY IN TORT FOR EXERCISE OF POWERS IN BAD FAITH

It has been said that " if a man is required in the discharge of a public duty to make a decision which affects, by its legal consequences, the liberty or property of others, and he performs that duty and makes that decision honestly and in good faith, it is . . . a fundamental principle of our law that he is protected "[4] against civil liability in respect of the consequences of that decision. Clearly this proposition is inapplicable to many statutory functions involving the exercise of discretion. The repository of a discretion may often be held liable in tort for the consequences of an erroneous, negligent or unreasonable exercise of a discretion, although he has acted in perfectly good faith. Even where a statute has exempted public officers from liability for acts done " bona fide for the purpose of executing this Act," the courts have held that a negligent act causing damage is none the less actionable.[5] But the passage quoted may be a correct statement of the rules applicable to the exercise of certain classes of statutory functions. Thus, election officers who had wrongfully refused to accept the votes of legally qualified voters were held to be immune from civil liability unless they had acted in bad faith.[6] The General Medical Council was held not to be liable for having removed a dentist from the register by an improper procedure but in good faith.[7] A justice of the peace who had signed an order for the reception of a person as a lunatic was held not to be liable for false imprisonment even if he had acted negligently, for he had acted in good faith.[8]

The common thread running through these cases is the erroneous exercise of *judgment* on matters immediately affecting the legal rights of individuals. The functions discharged bore some resemblance to those commonly entrusted to judges in courts. It would appear justifiable to infer that members of administrative bodies which exercise functions of a broadly judicial character are not liable in tort for the consequences of erroneous or unreasonable decisions or procedural irregularities within the scope of their jurisdiction, provided that they have not acted in bad faith. Bad faith is here understood to mean wilful partiality or discrimination motivated by considerations that are incompatible with the discharge of public responsibilities. It should be added that an action for damages does not necessarily lie even in respect of acts done in bad faith, for the interest that has been injuriously affected may be one that is not protected by the law of tort.

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[2] Cases where affidavit evidence was admitted are cited by Gordon, 49 L.Q.R. at p. 427, n. 43.

[3] *Colam* v. *Mansfield* (1872) 26 L.T.(N.S.) 661, at p. 663; see also *R.* v. *Licensing Authority for Goods Vehicles for the Metropolitan Area, ex p. Barrett (B. E.) & Co.* [1949] 2 K.B. 17, at p. 22.

[4] *Everitt* v. *Griffiths* [1921] 1 A.C. 631, at p. 695, *per* Lord Moulton (dictum).

[5] *Bullard* v. *Croydon Hospital Group Management Committee* [1953] 1 Q.B. 571, construing s. 72 of the National Health Service Act, 1946; see also Public Health Act, 1875, s. 265; Public Health Act, 1936, s. 305.

[6] *Tozer* v. *Child* (1857) 7 E. & B. 377; *Drewe* v. *Coulton* (1787) 1 East 563n., applying Holt C.J.'s judgment in *Ashby* v. *White* (1703) 2 Lord Raym. 938. No civil liability is now incurred by election officers for breach of official duty (Representation of the People Act, 1949, s. 50).

[7] *Partridge* v. *General Council of Medical Education and Registration* (1890) 25 Q.B.D. 90. The authority of this decision is not beyond question, for the Council's procedural error amounted to a denial of natural justice.

[8] *Everitt* v. *Griffiths* [1921] 1 A.C. 631.

Whether members of inferior courts *stricto sensu* are liable for judicial acts done in bad faith within their jurisdiction has never been finally settled.[9] Unlike the members of most administrative tribunals, they are immune from liability for malicious words spoken in the exercise of their jurisdiction[10]; but even if their immunity does extend to malicious judicial acts, there is no reason why members of administrative tribunals should be exempted from the ordinary legal consequences of wilful misconduct.

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[9] The view that liability exists at common law is supported by dicta of the House of Lords in *Ferguson* v. *Earl of Kinnoull* (1842) 9 Cl. & F. 251, at pp. 290, 312; see also *O'Connor* v. *Isaacs* [1956] 2 W.L.R. 585, at p. 598, *per* Diplock J.; Justices Protection Act, 1848, s. 1 (which presupposes the existence of such liability); Street, *Law of Torts*, p. 101. Doubts are expressed by Winfield, *Present Law of Abuse of Legal Procedure*, pp. 216–219; Salmond on *Torts*, 11th ed., pp. 733–734; and Sheridan, "Protection of Justices" (1951) 14 M.L.R. 267. No liability attaches for acts done under justices' orders unless the act involves a trespass to goods or to the person: *Polley* v. *Fordham* (*No.* 1) [1904] 2 K.B. 345, at p. 348; *O'Connor* v. *Isaacs* [1956] 2 W.L.R. 585; 3 W.L.R. 172 (C.A.).

There is no doubt that justices may be liable for malicious administrative acts done within their jurisdiction, and also for non-malicious refusal to perform ministerial duties.

[10] *Law* v. *Llewellyn* [1906] 1 K.B. 487 (absolute privilege of justices of the peace).

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This digest, which has been compiled by the Editor, covers the period from April 1, 1956, to June 30, 1956.

## UNITED KINGDOM

### COMPULSORY PURCHASE

**Compensation**

*Rate of Interest.* Regulations have been made increasing from 5½ per cent. to 6 per cent. per annum the rate of interest payable where entry is made, before payment of compensation, on land in England, Wales or Scotland, which is being purchased compulsorily (Acquisition of Land (Rate of Interest on Entry) (No. 2) Regulations, 1956 (S.I. 1956 No. 594, repealing S.I. 1956 No. 185); for Scotland, see S.I. 1956 No. 595, repealing S.I. 1956 No. 186).

**Right of application**

"*Person aggrieved.*" The Minister of Housing and Local Government had confirmed a clearance and compulsory purchase order; the applicant, who was not an owner or occupier of premises comprised in the order but the secretary of a tenants' association, to which two persons living in the area belonged, applied to a "person aggrieved" to have the order quashed. *Held*, that the court had no jurisdiction to entertain the application as he was not a "person aggrieved" within the meaning of para. 2 of the Second Schedule to the Housing Act, 1936: BURKE *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT [1956] J.P.L. 429.

See also SMITH *v.* EAST ELLOE R. D. C. (p. 249, below).

### CONTRACT

**Powers of the Crown**

*Unpatented inventions and unregistered designs.* Under the Patents Act, 1949, and the Registered Designs Act, 1949, Government Departments are empowered to authorise the use, by contractors with the Crown for defence purposes, of knowledge contained in patented inventions and registered designs, notwithstanding any restrictions which the owners of the patents, etc., may have imposed in their own interests. But industry now relies increasingly on other unpatented technical information the use of which is restricted by agreement. During the late war, Defence Regulations enabled contracting Departments, for defence and other purposes (a) to authorise the use of such information, and (b) to direct its disclosure to others, in abrogation of any existing agreements as to payment, non-disclosure, or use. The second of these provisions has lapsed but the first remains and in November, 1955, the President of the Board of Trade appointed a Committee of Enquiry (Chairman: Sir Harold Howitt) to consider whether the Crown should have permanent powers to authorise the use, in connection with defence contracts, of such information and thereby to override contractual obligations. This

Committee reported (in summary) that the Crown should be given permanent powers to authorise the use, but not the disclosure, of such information in connection with defence contracts; that compensation should be paid with a right of appeal to a judge of the High Court (sitting with assessors if the parties so request); that appeal should be possible in respect of compensation or of the *vires* of the Crown's decision but not on whether the decision was reasonable. The Report recommended that either the Minister or the permanent head of the Department concerned should certify that he personally has considered the particular case and is of opinion that it is fair and reasonable that the powers should be exercised; the constitutional propriety of this recommendation is specifically defended (para. 24 and Appendix IV) (Report of the Committee of Enquiry on the Powers of the Crown to Authorise the Use of Unpatented Inventions and Unregistered Designs in connection with Defence Contracts (Cmd. 9788) ).

## COURTS

### Accounts

*Supreme Court.* The Account for 1954–1955 has been issued of the receipts and expenditure of the Accountant-General of the Supreme Court, in respect of the funds of suitors; also, the statement of liability of the Consolidated Fund; also, the Account of the National Debt Commissioners; together with the Report of the Comptroller and Auditor-General thereon (H.C. 229 of 1955–1956).

### Jurisdiction

*County court.* Section 38 (3) of the Water Act, 1945, provides that water rate may be recovered either summarily as a civil debt or as a simple contract debt in any court of competent jurisdiction; and that the undertakers may, on failure to pay, cut off the supply of water but that, if notice is given to them that there is a dispute as to the amount due or as to the liability to pay, they shall not cut off the water until the dispute has been settled by a court of summary jurisdiction. Section 62 (1) of the Local Government Act, 1948, provides that so much of any statutory provision as authorises or requires any dispute arising in relation to water rates to be determined by a court of summary jurisdiction shall have effect as if it authorised or required that dispute to be determined by the county court. Section 1 (3) (*e*) of the Lands Tribunal Act, 1949, provides that there shall be referred to and determined by the Lands Tribunal any question on which an appeal or reference to the county court would or might be made by virtue of sections 49, 62 or 87 of the Local Government Act, 1948.

The respondent was served with a demand note in respect of water rates. He did not dispute liability but claimed that he was entitled to a discount of 10 per cent. under section 129 of the Public Health Act, 1936, and section 11 (1) of the Rating and Valuation Act, 1925. The appellants had claimed the amount representing the discount in the county court. The respondent submitted that the county court had no jurisdiction. *Held*, that the transfer of jurisdiction conferred by the Water Act, 1945, and thence to the Lands Tribunal was limited to jurisdiction in those cases where the water undertakers had elected to proceed by cutting off supplies of water instead of taking the defaulter immediately to court and that the dispute in question was within the jurisdiction of the county court: SOWERBY BRIDGE U. D. C. *v.* STOTT [1956] 3 W.L.R. 1; [1956] 2 All E.R. 264, C.A.

*Statutory exclusion.* Sched. I, Pt. IV, para. 15, of the Acquisition of Land (Authorisation Procedure) Act, 1946, provides: " If any person aggrieved by a compulsory purchase order desires to question the validity thereof . . . on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act . . . he may, within six weeks from the date on which notice of the confirmation or making of the order . . . is first published . . . make an application to the High Court. . . ." Para. 16 provides: " Subject to the provisions of the last foregoing paragraph, a compulsory purchase order . . . shall not . . . be questioned in any legal proceedings whatsoever. . . ."

Land belonging to the appellant having been made the subject of a compulsory purchase order, she brought an action, more than six weeks after notice of its confirmation, against the local authority, its clerk and the Government Department which had confirmed the order, claiming damages, an injunction against further trespass and a declaration that the order was made and confirmed wrongfully and in bad faith and that the clerk acted wrongfully and in bad faith in procuring the order and its confirmation. An application was made to strike out the writ of summons. *Held*, (1) (unanimously) that the action might proceed against the clerk for damages, but (2) (*per* Viscount Simonds, Lord Morton of Henryton and Lord Radcliffe, Lord Reid and Lord Somervell of Harrow dissenting) that the action against the council and the Government Department could not proceed by reason of the plain prohibition in paragraph 16 (which applied to compulsory purchase orders in general) against questioning the validity of the order, whereby the jurisdiction of the court was ousted. *Per* Lord Morton of Henryton, Lord Reid and Lord Somervell of Harrow, Lord Radcliffe dissenting: Paragraph 15 gives no opportunity to a person aggrieved to question the validity of a compulsory purchase order on the ground that it was made or confirmed in bad faith: SMITH *v.* EAST ELLOE R. D. C. [1956] 2 W.L.R. 888; [1956] 1 All E.R. 855, H.L.

Answering a Question in the House of Commons, the Attorney-General said that in his view the judgments in this case did not give rise to any need for legislation at present and that the point at issue in the case was whether a compulsory purchase order could be challenged years after it had been made when the statute provided that a challenge could only be made within six weeks (552 H.C. Deb. 1646–1647, May 14, 1956).

**Legal Aid**

*Advice scheme.* The Attorney-General stated that very close consideration was being given to the Report of the Select Committee on Estimates (see below) about the advantages of introducing the advice scheme (553 H.C. Deb. 685, June 4, 1956).

*Appeal.* The Attorney-General stated that the Government could not at present contemplate extending the legal aid scheme to litigants whose cases proceeded to the House of Lords (553 H.C. Deb. 685–686, June 4, 1956).

*Report.* The Select Committee on Estimates have reported on Legal Aid. In their Conclusions (para. 119), the Committee emphasise that people are discouraged by their liabilities under the Scheme from litigating unless they consider that they have a proper case and that aid is never granted carelessly; they record their conviction that, in general, the Scheme is well run and that proper regard is shown for economy. The Recommendations of the Committee are summarised as follows:—(1) If a fall, similar to that between 1953–1954 and 1954–1955, recurs in the percentage of successful assisted persons' cases during the financial year 1955–1956, a thorough review of the operation of the Scheme should be undertaken by the Lord Chancellor's Office and the Legal Aid Committee of the Law Society to determine the reasons for the fall and to explain them to the public (para. 56). (2) The Divorce Department should be abolished if it becomes apparent that no substantial savings are being made per case handled (para. 62). (3) In the future the heads of the Estimates should conform with the items in the published Legal Aid Fund Accounts (para. 64). (4) The use of Emergency Certificates should be kept to an absolute minimum (para. 70). (5) Consideration should be given to the early implementation of section 5 of the Act (legal aid in matters not involving litigation) (para. 77). (6) Only limited certificates should be issued in all cases where facts are in doubt (para. 80). (7) A procedure should be devised to enable the Area Committee concerned with the plaintiff's certificate to be made aware of the aided defendant's means, as discovered by the National Assistance Board, in actions for damages where both parties are aided (para. 83). (8) Greater care should be exercised by certifying committees in issuing certificates to plaintiffs in actions for damages where the defendant's means are likely to be inadequate (para. 84). (9) The attention of those concerned should be drawn to the possibilities of awarding costs against assisted persons and to the provisions of section 2 (2) (*e*) of the Act (para. 108). (10) The Law Society should take steps to inform solicitors who act for assisted clients of the need to employ counsel only where necessary (para. 111). (11) Steps should be taken to ensure that solicitors expedite the preparation of their bills for taxation (para. 113). (12) The Lord Chancellor should consider the possibility of enabling the Legal Aid Fund to be represented on taxations in the ways suggested by the Senior Taxing Master in the second Memorandum submitted by him to the Sub-Committee (Appendix 12) (para. 115).

Evidence was heard from the Lord Chancellor's Department, the Law Society, the Scottish Home Department, the Law Society of Scotland, the General Council of the Bar, the Rt. Hon. Lord Goddard, the Rt. Hon. Lord Merriman, the Principal Probate Registry, the Rt. Hon. Sir Raymond Evershed, and the Supreme Court Taxing Office (Fourth Report from the Select Committee on Estimates (H.C. 209 of 1955–1956) ).

### Procedure

*County Court.* The County Court Rules, 1936, have been amended. The new Rules revoke the provisions relating to appeals to the Court of Appeal under the Representation of the People Act, 1949, which will in future be regulated by Rules of the Supreme Court; they provide that fees paid to interpreters may be allowed on taxation; and they amend the form of indorsement of service of a summons on a limited company (S.I. 1956 No. 471, amending S.R. & O. 1936 No. 626).

*Supreme Court.* Amendments to the Rules of the Supreme Court abolish the appearance fee payable by a defendant who enters an appearance by post; prescribe the time within which appeals to the High Court from Panel (Complaints) Tribunals under the Legal Aid and Advice Act, 1949, are to be brought; revoke a number of Rules or parts of Rules which are now obsolete (S.I. 1956 No. 551).

### Statistics

*Civil judicial.* The statistics have been published relating to the Judicial Committee of the Privy Council, the House of Lords, the Supreme Court of Judicature, county courts and other civil courts for 1955 (Cmd. 9775).

## CRIMINAL LAW

### Fraud

*On the public.* A fraud on the public by an individual is indictable at common law, although the particular fraud might not have been indictable if it had been a fraud by one subject upon another. That doctrine, laid down in Hawkins' *Pleas of the Crown*, 8th ed., vol. 1, p. 322, and in East's *Pleas of the Crown* (1803), vol. 2, p. 821, was affirmed by Lord Mansfield in *R.* v. *Bembridge, infra.*

The appellant was convicted of making false statements to the prejudice of the Crown and the public revenue with intent to defraud. He appealed on the ground that the offence charged was not one known to the common law. *Held*, the appellant had defrauded the Crown and the public and was rightly convicted: R. *v.* HUDSON [1956] 2 W.L.R. 914; [1956] 1 All E.R. 814, C.C.A. (applying dictum of Lord Mansfield C.J. in *R.* v. *Bembridge* (1783) 22 St.Tr. 1, 155).

## EDUCATION

### Advisory Council

*Appointment.* Sir Harry Pilkington has been appointed Chairman of the National Advisory Council on Education for Industry and Commerce with effect from July 1, 1956 (552 H.C. Deb. *123*, May 10, 1956).

### Independent schools

*Registration.* Part III of the Education Act, 1944, is to be introduced on September 30, 1957. From that date proprietors of independent schools will be under an obligation to register their schools. The Minister of Education is appointing one of his officers to be Registrar. The Minister will exercise his power under section 70 (2) of the Act to exempt from registration those independent schools which are recognised by him as efficient at the beginning of the autumn term 1957. Schools thus exempted will be deemed to be registered. Annual returns are already required from these schools as a condition of recognition. Section 71 (1) of the Act provides that the Minister may find a school " objectionable " because its premises or accommodation are inadequate or unsuitable, or the instruction is not efficient and suitable, or the proprietor or a teacher is not a proper person to be the proprietor of an independent school or to be a teacher in any school. There is a right of appeal to the Independent Schools Tribunal consisting of a Chairman and two other members, the Chairman drawn from a panel appointed by the Lord Chancellor and the two members from a panel appointed by the Lord President of the Council. The Tribunal have power to order that (a) the complaint be annulled; (b) the school be struck off the register; (c) in various ways, the defects be remedied. (Ministry of Education: The Introduction of Part III of the Education Act, 1944, and the Registration of Independent Schools: Explanatory Memorandum.)

### Salaries

*Burnham Committees.* The Minister of Education has nominated Lord McNair to succeed Lord Percy of Newcastle as Chairman of the Burnham Committees (*The Times*, May 17, 1956).

See also SCOTLAND (p. 278, below).

## GOVERNMENT FUNCTIONS AND APPOINTMENTS

### Appointment

*British Sugar Corporation.* The Minister of Agriculture, Fisheries and Food, with the approval of the Treasury has appointed Mr. J. P. Van den Bergh, C.B.E., to be a Government Director of the Corporation.

### Central Land Board

*Report.* The Annual Report for 1955–1956 has been published (H.C. 305 of 1955–1956).

### Civil Service

*Categories.* The Secretary to the Treasury stated the numbers of non-industrial staffs, permanent and temporary, as at July 1, 1955, analysed according to the main functional groups, *i.e.*, administrative (home and foreign), executive (2 groups), clerical (2 groups), sub-clerical, typing, inspectorate, messengerial, Post Office minor and manipulatives, professional, scientific and technical (553 H.C. Deb. 2, May 29, 1956).

*Status.* B., an established civil servant, was injured in a road collision with the defendant and was unable to work for several months. The plaintiffs, in an action *per quod servitium amisit* for the loss of B.'s services, claimed against the defendant for payments made to B. during his absence. It was conceded that the payment of sick pay to B. was a voluntary act in the discretion of the Crown. *Held,* (1) (applying *Att.-Gen. for New South Wales* v. *Perpetual Trustee Co., infra*) in order to found the action *per quod servitium amisit* there must be some relationship of master and servant, whether arising out of contract or of domestic circumstances, and accordingly the action was not available in the present case; (2) even if the relationship which existed was contractual, the contract was one which gave the employee no remedy against his employer for its breach and was wholly different in kind from those which had hitherto supported the action; (3) (applying dictum of Lord Sumner in *Admiralty Commissioners* v. *The S.S. Amerika, infra,* and not following *Att.-Gen.* v. *Valle-Jones, infra*) damage was an essential ingredient in this form of action and an *ex gratia* payment (such as had been made to B.) could not found a claim for damages: I. R. C. *v.* HAMBROOK [1956] 2 W.L.R. 919; [1956] 1 All E.R. 807, Lord Goddard C.J. (applying *Att.-Gen. for New South Wales* v. *Perpetual Trustee Co.* [1955] A.C. 457; [1955] 2 W.L.R. 707; [1955] 1 All E.R. 846, and *Admiralty Commissioners* v. *The S.S. Amerika* [1917] A.C. 38; not following *Att.-Gen.* v. *Valle-Jones* [1935] 2 K.B. 209).

J. was employed as an Indian civil servant under a covenant made between him and the Secretary of State for India in 1940. His employment was terminated in August, 1947, when India was granted home rule. J. claimed damages against the Crown for breach of contract of employment. Streatfeild J., giving judgment for the defendant *held,* that as by section 240 (1) of the Government of India Act, 1935, an Indian civil servant held office " during his Majesty's pleasure " and as J.'s covenant made a similar provision for his employment to continue during his Majesty's pleasure, there was no breach of contract by the Crown; in any event J.'s claim was statute-barred by section 2 of the Limitation Act, 1939, since the breach, if any, occurred on August 15, 1947, and the writ was not issued until August 12, 1954: JONES *v.* ATT.-GEN. [1956] 5 C.L. 423.

*Oversea C. S.* H.M.'s Government in the U.K. are prepared, subject to the agreement of the governments concerned, to introduce a new scheme the main features of which are (i) There will be a Special List of Officers of H.M.'s Oversea C. S. who will be in the service of H.M.'s Government and be seconded to the employing Government. (ii) While seconded, officers will serve on salaries and conditions prescribed by H.M.'s Government after consultation with the employing Government. (iii) The employing Government will be asked to agree not to terminate secondment without one year's notice and to consult H.M.'s Government before introducing any scheme of reorganisation which might involve terminating the secondment of a considerable number of officers. (iv) Officers transferred to the Special List will accept an obligation to serve H.M.'s Government up to the age of fifty in any post to which they may be assigned but will not be required to accept assignment to a post of less value than that in which they are currently serving. (v) Special rules are laid down for officers who are not employed to the age of fifty.

H.M.'s Government are now to approach the Federal and Regional Governments in Nigeria (where acute staffing difficulties exist) with a view to working out detailed arrangements, if those governments agree, for the transfer on certain conditions of existing expatriate pensionable officers to the Special List. The scheme will be in a form which will make it possible for similar arrangements to be applied to other territories as and when H.M.'s Government are satisfied that circumstances make such action desirable (H.M.'s Oversea Civil Service: Statement of Policy regarding Organisation (Cmd. 9768); see also 552 H.C. Deb. 2222 and 197 H.L. Deb. 502, May 17, 1956).

### Minister's Functions

*Civil Defence.* Certain functions of the Minister of Health under the Civil Defence Act, 1948, relating to the temporary accommodation and maintenance of persons who, owing to hostile action or threat of hostile action, are made homeless or leave their homes, or are refugees or persons repatriated from abroad, have been transferred to the Minister of Housing and Local Government (Civil Defence (Designation of the Minister of Housing and Local Government) Order, 1956 (S.I. 1956 No. 824, amending S.I. 1949 No. 1438 and S.I. 1951 No. 755) ).

The remainder of the functions of the Minister of Health under the Civil Defence (Evacuation and Care of the Homeless) Regulations, 1949 (S.I. 1949 No. 2147), have been transferred to the Minister of Housing and Local Government (Transfer of Functions (Civil Defence) Order, 1956 (S.I. 1956 No. 825) ).

### National Joint Advisory Council

*Appointment of Committee.* It has been decided to set up a Standing National Committee to keep under review progress in furthering all aspects of industrial safety, consisting of three representatives of the British Employers' Confederation, three representatives of the T. U. C. General Council, one representative of the Boards of the Nationalised Industry, with a Chairman and Secretary from the Ministry of Labour and National Service.

### New Towns

*Accounts.* These have been published showing the sums issued out of the Consolidated Fund and the Advances made therefrom to Development Corporations in England and Wales and Scotland under the New Towns Act, 1946, from 1954–1955; together with the Report of the Comptroller and Auditor-General thereon; and copies of the audited accounts of the Corporations for 1954–1955 (H.C. 285 of 1955–1956).

### Regional Organisation

*Review.* The Report of the Committee (Chairman: Sir Arton Wilson) appointed to review the provincial and local organisation and procedures of the Ministry of Agriculture, Fisheries and Food, has been published. Important changes are recommended. These include (1) County Agricultural Executive Committees should be largely freed from routine administration and devote themselves to the shaping and development of agricultural policy by promoting advisory and technical work in their counties and providing advice and information for the Minister. (2) The many separate groups of regional staff should be concentrated in regional offices and co-ordinated by a Regional Controller. This structure should be the basis for further decentralisation of functions from Headquarters. The present sixty county offices should be reorganised into thirty-five to forty units. (3) Other recommendations relate to milk organisations, the National Agricultural Advisory Service, the Agricultural Land Service, the Veterinary Service, and the Pests Service (Cmd. 9732).

The Minister stated that consultations with county agricultural executive committees and other organisations were proceeding, but in view of the far-reaching effect of some of the Committee's recommendations it was bound to be some little time before he could make a statement (553 H.C. Deb. 1257–1258, June 7, 1956).

**Research**

*Department of Scientific and Industrial Research.* In April, 1955, the Lord President of the Council appointed a Committee of Inquiry (Chairman: Sir Harry Jephcott) into the organisation and functioning of the Department. The Committee has published an interim Report which proposes that the constitution of the Department should be changed as follows: (a) The Department should be under the charge of a Scientific and Industrial Research Council, which would be appointed by and responsible to the Minister. (b) The Council should be executive, not advisory; the present Advisory Council should be abolished. (c) The Secretary, who would be a Civil Servant, should be the head of the Department under the Council, the Secretary of the Committee of the Privy Council (if this continues in existence) and the accounting officer. (d) The Secretary should act as the Minister's senior permanent adviser and have direct access to him in all matters affecting his responsibilities as accounting officer. (e) The Council should be empowered to appoint committees with members co-opted from outside its own membership (Cmd. 9734).

The Parliamentary Secretary to the Ministry of Works, as representing the Lord President of the Council, stated that these recommendations formed the basis of the main provisions of the Department of Scientific and Industrial Research Bill (552 H.C. Deb. 1017, May 8, 1956).

Sir Harry Jephcott has accepted the invitation of the Lord President of the Council to become chairman of the Advisory Council for Scientific and Industrial Research in place of Sir Hugh Beaver, who has resigned but will continue to serve as a member (*The Times,* May 16, 1956).

The Fire Research Board has issued its Report, with the Report of the Director of Fire Research, for 1955 (D.S.I.R. 47–151–0–55).

*National Research Development Corporation* has issued its Report and Statement of Accounts for the year 1954–1955 (H.C. 232 of 1955–1956).

**Security**

*Government action.* On June 11, 1956, the Minister of Supply stated that Imperial Chemical Industries, Ltd., had been informed that the Ministers responsible were not prepared to place secret contracts with them in circumstances which would enable Mr. J. H. A. Lang to have access to secret information disclosed in connection with them; that any subsequent action taken in relation to Mr. Lang's employment was the responsibility of the Company; that the Government's decision was confirmed after representations made by Mr. Lang, at his request, to a representative of the Ministers concerned had been exhaustively considered. The Minister said that he was not prepared to make public the information available to H.M.'s Government but that H.M.'s Government had followed the recommendations of the Conference of Privy Councillors on Security (see above, p. 146); that Mrs. Lang's political associations were one of a number of matters taken into consideration; that Mr. Lang had been asked whether he would prefer to wait until it was known whether the procedure of the Three Advisers was to be extended to people outside Government employment and then to avail himself of it but that he preferred to proceed by way of interview with a representative of the responsible Ministers (554 H.C. Deb. 18–22, June 11, 1956; for an account of the relationship between the Government and I.C.I., between 1951 and 1955, concerning Mr. Lang, see 554 H.C. Deb. 6–9, June 25, 1956).

Mr. J. H. A. Lang was employed by I.C.I. as assistant solicitor. On June 8, 1956, the Company wrote to Mr. Lang giving him notice of immediate termination of his employment (*The Times,* June 11, 1956).

In the course of a debate in the House of Lords the Lord Chancellor stated that the Government had decided that contractors' employees who, as a result of a directive by a Minister, were dismissed, or in his opinion were liable to suffer financial loss, should have the same rights as Civil Servants of appearing before the Three Advisers (197 H.L. 1266–1267, June 21, 1956).

### Wages Councils

*Abolition.* The Minister of Labour and National Service has decided to take the necessary steps for the purpose of abolishing the Chain Wages Council.

The Minister has made an Order abolishing the Central Co-ordinating Committee for the Retail Trades and Hairdressing Wages Councils set up in 1949 (S.I. 1956 No. 865).

*Establishment.* The Report has been issued of a Commission of Inquiry (Chairman: Professor H. S. Kirkaldy) to consider an application for the establishment of a wages council for the Rubber Proofed Garment Making Industry. The Commission recommended the establishment and the Minister gave notice of his intention to make the appropriate Order.

## INQUIRIES

### Transport

*Air.* The Report (No. C. 636) has been published of the Chief Inspector of Accidents on the accident to Dove G-AKSK which occurred on July 23, 1955, in the New Forest. The Report is dated February 28, 1956 (C.A.P. 136).

The Report (No. C. 637) has been published of the Chief Inspector of Accidents on the accident to Avro 19, G-AHIG which occurred on August 6, 1955, in the Solent. The Report is dated March 16, 1956 (C.A.P. 137).

*Railway.* The Report has been published on the derailment which occurred on May 28, 1955, at Wormit in the Scottish Region. The Report is dated December 22, 1955.

The Report has been published on the derailment which occurred on August 7, 1955, at Barby Sidings in the London Midland Region. The Report is dated February 22, 1956.

The Report has been published on the derailment which occurred on November 24, 1955, between Garston and Hunts Cross West in the London Midland Region. The Report is dated March 28, 1956.

See also TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (p. 280, below).

## LOCAL GOVERNMENT

### Elections

*Cost.* The Home Secretary stated that in 1953 (the latest available date) the net expenditure from the rates on council elections was £415,000 and that the expenditure in 1956 would be of the same order.

### Finance

*Borrowing.* The rates of interest to local authorities borrowing from the Local Loans Fund from June 23, 1956, have been reduced on loans for not more than five years, to 5¼ per cent. (S.I. 1956 No. 958, revoking S.I. 1956 No. 431).

*Grants.* The Minister of Housing and Local Government has given details of the Exchequer Equalisation Grants payable to each county borough and county for 1955–1956 and 1956–1957 expressed as rates in the pound (554 H.C. Deb. 247, June 12, 1956).

Regulations have been made prescribing the manner in which Exchequer Equalisation and Exchequer Transitional Grants to counties and burghs under the Local Government (Financial Provisions) (Scotland) Act, 1954, for the year 1956–1957 and subsequent years are to be paid (S.I. 1956 No. 646).

*Rating and valuation.* The Industrial Rating Bill (see above, p. 150) was defeated on its Third Reading by 179 votes to 134 (551 H.C. Deb. 2143–2226, April 27, 1956).

For a decision on the jurisdiction of the county court to hear disputes arising out of a water rate, see SOWERBY BRIDGE U.D.C. *v.* STOTT (above, p. 249).

The Ministry of Housing and Local Government have published the annual return for 1955–1956 of rates levied and rateable values in England and Wales (Rates and Rateable Values in England and Wales 1955–1956) together with a Supplement showing rateable values and numbers of hereditaments in the new valuation lists which came into force on April 1, 1956.

The Scottish Home Department have published returns of rates in Scotland for 1954–1955 and 1955–1956, rateable values for 1955–1956, and population and area for 1955 (Rates in Scotland).

*Review.* The Minister of Housing and Local Government stated that the effects of revaluation were being studied together with other related aspects of local government finance; that this was the most thorough review since 1929 and included an examination of derating; that the Government expect to be ready with proposals for discussion with local authority associations by the autumn and hoped to announce the Government's conclusions before the end of the year (552 H.C. Deb. 97, May 8, 1956).

**Inquiry**

*Blackpool County Borough Council.* The recent allegations of bribery and corruption were further debated in Blackpool Council on June 6, 1956, and a resolution was carried unanimously that the council favoured the holding of an inquiry either by a Government Department or a tribunal under the Tribunals of Inquiry (Evidence) Act, 1921. The resolution instructed the Town Clerk to begin action to that end (*The Times*, June 7, 1956).

**Members**

*Disqualification.* Section 76 (1) of the Local Government Act, 1933, provides: " If a member of a local authority has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter, and is present at a meeting of the local authority at which the contract or other matter is the subject of consideration, he . . . shall not . . . vote on any question with respect to the contract or other matter, provided that this section shall not apply to an interest in a contract or other matter which a member may have as a ratepayer or inhabitant of the area . . . or to an interest in any matter relating to the terms on which the right to participate in any service, including the supply of goods, is offered to the public."

The six appellants, members of a local council, were the tenants of council houses; three of them had lodgers. At a meeting of the council a resolution was moved providing that, except in the case of tenants of council houses who were members of the council, the requirement that tenants who took in lodgers should pay a " lodger's levy " to the council should cease to operate. An amendment was moved that the words " except in the case of tenants of council dwellings who are members of the council " should be deleted. The appellants declared their interest as tenants and each voted against the amendment and for the resolution. They were convicted of voting at a council meeting in a matter in which they had a pecuniary interest contrary to section 76 (1) of the Local Government Act, 1933. *Held*, (1) it did not matter whether the appellants obtained a pecuniary advantage or not; persons who paid rent for houses had a pecuniary interest in the resolution and the amendment whether they took in lodgers or not; (2) the provision of housing was not a "service" within the meaning of the proviso to section 76 (1); therefore, the appeals must be dismissed: BROWN *v*. D. P. P. [1956] 2 W.L.R. 1087; [1956] 2 All E.R. 189, D.C.

*Voting rights.* The Ministry of Housing and Local Government have issued a circular on voting by councillor tenants on rent policy. This elaborates the statement made by the Minister in the House of Commons on February 28, 1956 (see above, p. 151) (Circular No. 30/56).

### Police

*London.* The Report has been published of the Commissioner of Police of the Metropolis for 1955 (Cmd. 9786).

### Reorganisation

*Statement.* The Minister of Housing and Local Government, addressing the annual meeting of the County Councils Association on June 7, 1956, referred to the forthcoming White Paper of the Government's conclusions about the reform of local government and said: "In all the circumstances there appears to be no justification for fundamentally altering the present system of local government in England and Wales. What is needed is to overhaul it and make such modifications as are necessary to bring it up to date" (*The Times*, June 8, 1956).

### Transport

*Prosecution.* By section 8 of the Vehicles (Excise) Act, 1949, a county council is given not only the duty of levying duties but also duties in regard to those provisions which deal with the prosecution of offenders for breaches of the Road Vehicles (Registration and Licensing) Regulations, 1953. It makes no difference that a licence was issued in another county.

The respondent was charged with unlawfully using a general trade licence issued by Hampshire County Council. The prosecution was brought by the Surrey County Council through an officer authorised by it. The respondent contended that the Surrey County Council had no power to prosecute. The justices dismissed the informations, and the authorised officer of the Surrey County Council appealed. *Held*, the offences were committed in Surrey and the justices were wrong in holding that the Surrey County Council had no jurisdiction; accordingly an order of mandamus should issue: R. *v*. REIGATE JUSTICES, *ex p*. HOLLAND [1956] 1 W.L.R. 638; [1956] 2 All E.R. 289, D.C.

See also COMPULSORY PURCHASE (p. 248, above), COURTS (p. 249, above), EDUCATION (p. 252, above), TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (p. 280, below).

## MONOPOLIES AND RESTRICTIVE PRACTICES

### Reports

*Hard Fibre Cordage.* The Report of the Monopolies and Restrictive Practices Commission (Chairman: Sir David Cairns, Q.C.) on the supply of Hard Fibre Cordage has been published. The Commission found that the conditions to which the Act of 1948 applies prevail since the members of the Hard Fibre Cordage Federation together with certain other suppliers, supply more than one-third (and in fact nearly all) of the hard fibre cordage supplied in the United Kingdom and so conduct their affairs as to restrict competition in connection with its production and supply. The Commission made seven principal conclusions and recommendations (H.C. 294 of 1955–1956).

The President of the Board of Trade stated that so far as action on the report was concerned, as indicated during the Second Reading debate on the

Restrictive Trade Practices Bill (see above, p. 152), the Government did not propose to take action on matters which would be subject to the jurisdiction of the proposed Restrictive Practices Court (553 H.C. Deb. *81*, June 8, 1956).

## NATIONAL HEALTH SERVICE

### Central Health Services Council

The Report has been published of the sub-committee (Chairman: Sir Henry Cohen) on the medical care of epileptics (Ministry of Health 32-434).

### Cost

*Accounts.* Summarised accounts have been published of Regional Hospital Boards, Boards of Governors of Teaching Hospitals, Hospital Management Committees, Executive Councils (including Joint Pricing Committees and Drug Accounts Committee) and the Dental Estimates Board for England and Wales (H.C. 268 of 1955–1956) and for Scotland (H.C. 269 of 1955–1956) for 1954–1955, together with the Reports of the Comptroller and Auditor-General thereon.

*Guillebaud Committee.* The House of Commons has debated the Report of this Committee (see above, p. 153) (552 H.C. Deb. 851–966, May 7, 1956).

### Executive Councils

*Chairmen.* The Parliamentary Secretary to the Ministry of Health stated that on March 31, 1956, the chairmen of executive councils in England and Wales were in twenty-seven cases members of the medical profession (551 H.C. Deb. 1440–1441, April 23, 1956).

### Hospital Management Committees

*Appointment of members.* The relationship of such members to local authorities was debated shortly on the adjournment in the House of Commons (553 H.C. Deb. 199–210, May 29, 1956).

### Maternity services

*Committee of inquiry.* The Parliamentary Secretary to the Ministry of Health announced the names of those appointed to this committee (Chairman: The Earl of Cranbrook) (551 H.C. Deb. 1444–1445, April 23, 1956).

### Mental Health Service

The needs of this service were debated shortly on the adjournment in the House of Commons (553 H.C. Deb. 199–210, May 29, 1956).

### Nurses and Midwives Council

*Represented organisations.* The Parliamentary Secretary to the Ministry of Health stated that the full Staff side of the Council consisted of 41 representatives, *viz.*, Association of Hospital Matrons (2) and of Scottish Hospital Matrons (1); Association of Supervisors of Midwives (1); Confederation of Health Service Employees (4); Association of Hospital and Welfare Administrators (1); National and Local Government Officers' Association (4); National Union of General and Municipal Workers (3); National Union of Public Employees (4); Royal College of Midwives (6); Royal College of Nursing (12); Scottish Health Visitors' Association (1); Women Public Health Officers' Association (2) (552 H.C. Deb. *65*, May 7, 1956).

### Old people

The care of old people was debated shortly on the adjournment in the House of Commons (553 H.C. Deb. 199–210, May 29, 1956).

**Reciprocal arrangements**

*Commonwealth.* The Minister of Health stated that under Australian legislation free medical treatment was available to various classes of pensioners and their dependants. A reciprocal agreement enabled citizens from the United Kingdom to qualify for such pensions, and hence for free medical treatment, by virtue of their U.K. insurance. U.K. citizens in New Zealand received medical treatment on the same terms as N.Z. citizens although there was no formal reciprocal agreement to that effect (552 H.C. Deb. *66*, May 7, 1956).

*Foreign countries.* The Parliamentary Secretary to the Ministry of Health stated that a reciprocal agreement was in force between the U.K., France, Belgium, the Netherlands and Luxembourg for giving medical treatment to indigent persons. A convention extending this arrangement to all members of the Council of Europe was signed in December, 1953, and is in force between those countries which have ratified it (the U.K., the Irish Republic, the Netherlands, Norway, Denmark, the Saar and Sweden) (551 H.C. Deb. *40*, April 16, 1956).

**Working parties and committees**

*Names and membership.* The Minister of Health gave the names and membership of the eleven working parties and committees who were due to report on aspects of the health service. The subjects with which these bodies were concerned were: mileage, rehabilitation of disabled persons, recruitment and training of health visitors, hospital supplies, control of dangerous drugs and poisons in hospitals, maintenance of building plant and grounds, medical manpower, recruitment to the dental profession, social workers, and maternity services (552 H.C. Deb. *207*, May 18, 1956; 553 H.C. Deb. *32*, June 4, 1956).

## NATIONAL INSURANCE

**Benefits**

*Earnings Limit.* The National Insurance Advisory Committee recommended that the net amount which retirement and widow pensioners could earn without reductions in their pensions should be raised from 40s. to 50s. a week. The Committee also considered questions relating to return to regular employment, widowed mother's allowance and allowances for adult dependants. Two members (Professor R. M. Titmuss and Miss E. M. Spelman) dissented (Cmd. 9752). The Minister of Pensions and National Insurance stated that the Government accepted the recommendation of the majority of the Committee on the raising of the earnings limit and that deductions from pensions should only be made at the reduced rate of 6d. in the shilling on earnings between 50s. and 70s.; that, while the Government accepted the Committee's recommendation that the earnings limit for widowed mothers should remain at 60s., they proposed that deductions at the reduced rate of 6d. in the shilling should run up to 80s. a week instead of the 70s. proposed by the Committee. These charges were introduced as amendments to a private member's National Insurance Bill (Mr. Leather). Other recommendations of the Committee the Government either accepted in principle but could not now promise when legislation would be introduced or were still studying (552 H.C. Deb. 845–846, May 7, 1956).

*Increase.* The Pensions (Increase) Act, 1956 (4 & 5 Eliz. 2, c. 39), concerns some 600,000 pensioners of the public service and provides for increase of certain pensions with effect from April 1, 1956.

*Sweden.* Under an agreement between the United Kingdom and Sweden, British families will qualify for Swedish family allowances as soon as they become civilly registered in Sweden and British nationals resident in the U.K. will be entitled to use the Swedish health services while they are in Sweden.

The agreement covers also the cash benefits provided by the two countries for unemployment, sickness, maternity, old age, widowhood, orphanhood and industrial injury. The agreement will not come into operation until it has been ratified (554 H.C. Deb. 8, June 11, 1956).

*War Widows' Children.* The Minister of Pensions and National Insurance stated that amendments would be made to the Royal Warrants to provide that the allowance for each child of a war widow would be increased from 16s. 6d. to 21s. 6d. a week and by £13 to £63 10s. 0d. a year in the case of officers' children, with corresponding increase in the payments for war orphans (552 H.C. Deb. *76*, May 7, 1956).

### Contributions

*Research students.* The Minister of Pensions and National Insurance stated that he had come to the conclusion that research students holding postgraduate awards made for training in research methods or for studying under supervision for such higher degrees as Ph.D. should normally be treated as in full-time education, and excepted, if they so wished, from the payment of contributions. A student who so elected deprived himself of advantages under the National Insurance Scheme (see above, p. 155) (551 H.C. Deb. *46*, April 16, 1956).

### Decisions of the Commissioner and the Tribunal

*Compensation.* Under the National Insurance (Unemployment and Sickness Benefit) Regulations, 1948 (S.I. 1948 No. 1277 as amended by S.I. 1954 No. 117) regulation 6 (1) (*d*), unemployment benefit is not payable to a claimant who is in receipt of " compensation for the loss of the remuneration which he would have received if his employment had not been terminated."

Claimant was employed under an agreement which provided for a salary of £900 per annum paid monthly, and that the engagement should be determinable at any time by either party on at least six months' notice in writing. On the determination of the claimant's employment the employers paid him a sum equivalent to six months' salary as " compensation for loss of office." *Held,* that unemployment benefit was not payable to the claimant in respect of the period of six months following the termination of the employment—the inference was that the payment was in lieu of notice and there was no ground for suggesting that the payment to the claimant did not constitute compensation for loss of remuneration: Decision No. R(U) 31/55.

Claimant entitled to an annual salary and special expenses allowance was dismissed on one month's notice. There was no express agreement as to the duration of his contract and in lieu of further notice he was paid a sum equivalent to nine months' salary, which he contended was by way of damages for loss of office. *Held,* that the payment was compensation for loss of remuneration for the ensuing nine months and claimant was not entitled to unemployment benefit during that period: Decision No. R(U) 4/56.

*Earnings limit.* Under the National Insurance Act, 1946, s. 17 (3), as amended by the Acts of 1951 and 1952, where the earnings of a widow exceed 60s. in any week, the weekly rate of allowance or pension is reduced by an amount equivalent to the excess, but not greater than 32s. 6d., leaving an allowance of 10s. 6d. a week payable to the claimant in any event. Under the N.I. (General Benefit) Regulations, 1948 (S.I. 1948 No. 1278 as amended by S.I. 1949 No. 1984) regulation 4 (1) (*a*), the earnings to be taken into account are to exclude reasonable expenses incurred by the person in connection with the employment.

A woman in receipt of widowed mother's allowance was part-owner of a business, in which she worked and from which she received £7 15s. (gross) a week. She claimed to deduct from her earnings a sum of £3 18s. 11d. as the total cost of employing a woman who was employed to look after her child during her own working hours. *Held*, that the permissible deduction from her earnings for this purpose must be limited to what was reasonable in the light of her earnings regardless of her other resources; the expense and the earnings are directly related; a proportion of the expense amounting to 33s. 11d. (which included the national insurance contribution payable by claimant in respect of the woman) was reasonable: Decision No. R(G) 1/56.

A widow ran a boarding house throughout the year. In the summer season she averaged eight to nine boarders but in winter she obtained boarders only very infrequently. Apart from guests, she lived alone. *Held*, that her earnings should be averaged over the whole year, not merely over the busy weeks, as she took steps to obtain boarders throughout the year, the boarding house being maintained accordingly: Decision No. R(P) 4/56.

Comparable provisions of the Act of 1946 apply to retirement pensioners and regulation 4 (1) (*a*) (above) governs these provisions.

Pensioner paid income tax on her earnings but not under the P.A.Y.E. scheme. *Held*, that although, in calculating earnings, income tax paid under the P.A.Y.E. Scheme could be deducted, income tax paid by other methods could not be deducted: Decision No. R(P) 3/56.

"*Holiday*." Under N.I. (Unemployment and Sickness Benefit) Regulations, 1948 (S.I. 1948 No. 1277), regulation 6 (1) (*e*) (i), "a day shall not be treated as a day of unemployment if on that day a person does no work and . . . is on holiday."

Claimant was out of work when her factory closed down during a period of holiday as agreed between employers and workers. She did not qualify for holiday pay, having only recently begun employment there, and under the Holiday Agreement she was at liberty to take work, if available, throughout the holiday period. She sought work elsewhere, without success. *Held*, that she was "on holiday" in common with the other workers at the factory: Decision No. R(U) 7/56.

"*Incapable of self-support*." Under the National Insurance Act, 1946, s. 24, a beneficiary of sickness benefit is entitled to an increase in respect of his wife, although she is earning, if he is incapable of self-support. Section 78 (1) of the Act of 1946, by reference to the National Insurance (Industrial Injuries) Act, 1946, s. 35 (5) (*a*), provides that "a person shall be deemed to be incapable of self-support if, but only if, he is incapable of supporting himself by reason of physical or mental infirmity and is likely to remain so incapable for a prolonged period."

During the course of the claimant's sickness, his wife began to earn. The question for determination was whether the whole of the past and probable future period of sickness could be looked at to determine if that period was "prolonged" or only the probable future period. *Held*, that in judging whether the period was a prolonged one the past was to be taken into account as well as the future: Decision No. R(S) 2/56.

*Increase of benefit—gainful occupation*. Under the National Insurance Act, 1946, s. 24 (1), "the weekly rate of . . . a retirement pension shall be increased . . . for any period during which the beneficiary is residing with or is wholly or mainly maintaining his wife who is not engaged in any gainful occupation . . . from which her weekly earnings exceed twenty (now forty) shillings." Under the N.I. (General Benefit) Regulations, 1948 (S.I. 1948 No. 1278 as amended by S.I. 1949 No. 1984) regulation 4 (2), these weekly earnings are to be ascertained in the following manner: if there are earnings by the wife in the period of seven days immediately preceding the day in the week prescribed for the payment of the pension, by reference to those earnings.

Claimant's wife terminated her employment on a Wednesday, since when she had neither worked nor earned. *Held*, that an increase of retirement pension in respect of the wife was payable from and including Thursday, the following day. As the wife was not engaged in a gainful occupation on and after that Thursday, the need for ascertaining her earnings by reference to her earnings in the seven days immediately preceding that pension pay day did not arise: Decision No. R(P) 2/56.

*Late claim.* Under the N.I. (Claims and Payments) Regulations, 1948 (S.I. 1948 No. 1041 as amended by S.I. 1952 No. 1207) a claimant who has failed to claim sickness benefit may be deemed to have good cause for delay for a period during which he is in hospital if he makes his claim within three weeks after his discharge. Claimant claimed on the twenty-fifth day after discharge. If "three weeks" could be interpreted as twenty-one days excluding Sundays, his claim would succeed. *Held,* that although Sundays were disregarded in computing any period of consecutive days in relation to sickness benefit, *e.g.,* in requiring a claim to be made within so many days, they could not be disregarded in calculating a number of weeks: Decision No. R(S) 3/56.

*Necessary abstention from work.* Under N.I. (Mariners) Regulations, 1948 (S.I. 1948 No. 1467 as amended by S.I. 1949 No. 301) regulation 14B (2) a share-fisherman claiming unemployment benefit must prove that there was no work available because, *inter alia,* (*b*) the vessel was undergoing repairs or maintenance, or (*d*) any other good cause necessitated abstention from fishing.

Claimant was master and part owner of a fishing vessel. The boat was billed for sale and, in accordance with custom, laid up for a week before the date of sale for prospective buyers to examine it. *Held,* that claimant was not entitled to unemployment benefit for that week. The vessel was not undergoing repairs or maintenance and the circumstances did not constitute good cause necessitating abstention from fishing: Decision No. R(U) 5/56.

A claim was made under para. (*d*) referred to in last decision.

Claimant's vessel did not put to sea on a Friday due to bad weather, which cleared after midnight, but not, he alleged, in time for the vessel to reach her usual fishing ground and return in time for the local market on the Saturday morning. *Held,* that good cause necessitating abstention from fishing had not been established in respect of Saturday in that the claimant had failed to prove the absence of any possible market for a potential catch: Decision No. R(U) 6/56.

*Ordinarily working.* Under N.I. (Unemployment and Sickness Benefit) Regulations, 1948 (S.I. 1948 No. 1277) regulation 6 (1) (*e*) (ii), "a day shall not be treated as a day of unemployment if on that day a person does no work and is a person who does not ordinarily work on every day in a week (exclusive of Sunday or the day substituted therefor by paragraph (1) of regulation 4) but who has, in the week in which the said day occurs, been employed to the full extent normal in his case."

A bank guard, who was regularly employed on three days a week, secured temporary part-time work lasting eighteen weeks as a gardener on the other three days. *Held,* that the temporary part-time work did not remove him from the category of persons who do not ordinarily work on every day of the week, and he was not entitled to unemployment benefit when the temporary work ceased as he was employed to the full extent normal in his case: Decision No. R(U) 8/56.

A clerk, aged 62, had in only eight weeks in the last two years worked on days other than Mondays, Wednesdays and Fridays, on which days he was employed regularly each week. *Held,* that he was a person who did not ordinarily work more than three days a week and that he was not entitled to unemployment benefit in respect of other days in a week in which he worked three days. Length of time required to establish what is "normal" in a week discussed: Decision No. R(U) 9/56.

*"Parent"—natural father.* Under N.I. (Guardian's Allowances) Regulations, 1948 (S.I. 1948, No. 2687), regulation 2, subject to the provisions of

regulation 7, where a child has been adopted, for the condition that the parents of the child are dead there is substituted the condition that the two adopting spouses are dead. Regulation 7 provides " notwithstanding anything contained in these regulations, the parent . . . of a child shall not be entitled to a guardian's allowance in respect of that child."

An illegitimate child, whose mother had died, was adopted jointly by the parents of the child's natural father. Following the deaths of the adopters, the child became a child of the family of its father, who claimed guardian's allowance. *Held,* that guardian's allowance was not payable, by reason of regulation 7 of the National Insurance (Guardian's Allowances) Regulations, 1948, in which the word " parent " should be interpreted as including the natural parent of a child: Decision No. R(G) 12/55.

" *Period of interruption of employment.*" Under National Insurance Act, 1946, section 12 (2), " A person who (*a*) in respect of the period between his entry into insurance and any day of incapacity for work has paid less than one hundred and fifty-six contributions of the appropriate class; and (*b*) before that day has been entitled, in respect of any period of interruption of employment (whether including that day or not), to sickness benefit for three hundred and twelve days; shall not be entitled to sickness benefit for that day unless since the last of the said three hundred and twelve days and before that day he has requalified for benefit."

Claimant appealed against a decision that her right to sickness benefit became exhausted after receiving that benefit for 312 days in a period which included several months during which the claimant was in receipt of injury benefit. *Held,* that in determining a period of interruption of employment, account must be taken of all days of incapacity irrespective of whether claimant was in receipt of injury benefit or sickness benefit: Decision No. R(S) 1/56.

" *Prescribed accommodation.*" Under N.I. (Hospital In-patients) Regulations, 1949 (S.I. 1949 No. 1461, as amended by S.I. 1952 No. 2179), sickness benefit becomes payable when the beneficiary is discharged from hospital and is neither receiving free in-patient treatment nor residing in any prescribed accommodation. Prescribed accommodation means " in relation to any person, any hospital accommodation or similar accommodation in which that person is residing or has resided either as a patient or inmate or as a person in need of care and attention and wholly or partly at the cost of a local authority."

After receiving free in-patient treatment in a hospital forming part of a settlement established by a voluntary organisation for the care and rehabilitation of persons suffering from tuberculosis, claimant was discharged and, having previously completed training, became a colonist, working a seven-hour day, receiving a trade union rate of pay and paying for his own maintenance while living in the settlement hostel. *Held,* that claimant was not residing in prescribed accommodation, and therefore that he was entitled to receive the resettlement sum which had accrued during his periods of in-patient treatment: Decision No. R(S) 15/55.

Retirement benefit is affected similarly.

Following a period of full in-patient treatment in hospital, a retirement pensioner was sent to an old people's home administered under Part III of the National Assistance Act with the intention that she should become a permanent resident there. She was found to be unsuitable to be a resident of the home, owing to lack of nursing facilities there, and she was returned to hospital after one night in the home. *Held,* that the claimant could not properly be regarded as having resided at the home at all and that the period spent there should not be treated as a period of residence in prescribed accommodation: Decision No. R(P) 17/55.

*Procedure—statements in private.* Under N.I. (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948, No. 1144), regulation 13, a local tribunal, for the purpose of arriving at their decision or discussing any question as to their procedure, shall order all persons not being members of the tribunal, other than the person acting as clerk to the tribunal, to withdraw from the sitting of the tribunal. A tribunal may allow any other person appearing to them to be interested to be present during the consideration of a case, but, save as aforesaid, there shall not be admitted to the sitting of a local tribunal any member of the public or representative of any newspaper.

A claimant for unemployment benefit was dismissed for disobedience amounting to misconduct within the meaning of section 13 (2) of the Act of 1946. Two representatives of the employers were present at the hearing. The claimant wished to make a statement in private at the local tribunal hearing. *Held,* that the question whether witnesses should be excluded during any part of a local tribunal hearing is for the judicial discretion of the Chairman, but that it should be made clear to the claimant that the gist of any statement made in private may have to be communicated to the witnesses: Decision No. R(U) 2/56.

"*Public funds.*" Under the National Insurance Act, 1946, section 21 (1) (*c*) (iii) and N.I. (Widows' Benefit and Retirement Pensions) Regulations, 1948 (S.I. 1948, No. 1261), regulation 4 (1) (*d*), a woman, claiming retirement pension by virtue of her husband's insurance and being over the age of 60 at the date of the marriage, must prove that, immediately before the date of her marriage, she was entitled, otherwise than under the Act of 1946, "to any pension or allowance payable out of public funds and ceased to be so entitled by reason only of her marriage."

Claimant, formerly of Dutch nationality, was over pensionable age when she married a retirement pensioner in Great Britain. In Holland she had received a pension from Dutch public funds based on financial need not on insurance. *Held,* that the term "public funds" as used in regulation 4 (1) (*a*) of the National Insurance (Widow's Benefit and Retirement Pensions) Regulations, 1948, meant public funds of the United Kingdom and did not include public funds of a foreign country. She was not entitled to retirement pension by virtue of her husband's insurance: Decision No. R(P) 5/56.

*Retirement—continuing to work.* Under the National Insurance Act, 1946, section 20, a person is entitled to retirement pension if he is over pensionable age and has retired from regular employment.

A woman claimed to have retired from regular employment but intended to take visitors in her boarding house for several months a year during the summer holiday season. *Held,* that claimant could not be treated as retired from regular employment. Principles in Decision R(P) 8/54 applied: Decision No. R(P) 6/56.

*Trade dispute.* Under the National Insurance Act, 1946, s. 13, a person who has lost employment by reason of a stoppage of work which was due to a trade dispute is normally disqualified for receiving unemployment benefit.

Claimant, with other workers, withdrew his labour on July 28 owing to a dispute at his place of work. Work was resumed on August 3. Claimant contended that for some time before the strike he had been working short time and would, in any event, have been unemployed for two days during the period of the stoppage. *Held,* that claimant was disqualified for receiving unemployment benefit for so long as the stoppage continued: even if he would have been unemployed for other reasons on certain days during the period of the stoppage, this would not save him from disqualification in respect of those days: Decision No. R(U) 32/55.

Claimant lost his employment owing to a stoppage of work due to a trade dispute. The employees were prepared to return to work on September 24, but owing to delay in resumption of negotiations the stoppage continued until October 1. *Held,* that the claimant had not discharged the onus of proving that the delay in the resumption of work was due to causes other than the original dispute the merits of which were irrelevant: Decision No. R(U) 1/56.

Claimant voluntarily left his employment on September 20, no reason being given by him for so doing. A trade dispute was then in progress in the industry in which he was employed, and by September 24 his firm became involved in it and members of his grade or class lost their employment. *Held,* that claimant was disqualified for receiving unemployment benefit for so long as the stoppage of work continued: it must be inferred that by leaving his employment when he did he anticipated the stoppage of work and lost his employment by reason of it: Decision No. R(U) 30/55.

As an exception to the general principle, a person may not be disqualified if he can prove that he is not participating in or financing or directly interested in the dispute and that he does not belong to a grade or class of workers of which there were members employed at his place of employment any of whom are participating in or financing or directly interested in the dispute.

Claimant, a rivet-heater, became redundant as a result of a stoppage of work, due to a trade dispute, caused by riveters striking for more pay. On the basis of established practice, it was probable that the granting of the riveters' claim would affect the earnings of the rivet-heaters since their earnings were inter-related. *Held,* that the claimant had failed to discharge the onus of proving that the remuneration of the rivet-heaters would not be reviewed if the dispute resulted in a change in the riveters' remuneration. He was therefore directly interested in the dispute: Decision No. R(U) 3/56.

*"Wife"—polygamous marriage.* Decisions R(G) 18/52 and R(G) 3/55 were to the effect that a woman whose marriage conferred upon her husband the legal right to take another wife while his marriage to that woman was subsisting would not be a wife within the meaning of the National Insurance Acts so long as that legal right remained unchanged.

Claimant for maternity benefit based her claim on the insurance of a man whom she married in India according to the rites of the Sikh religion at a time when each was single. In certain circumstances the Sikh ceremony left it lawful for the husband to take a second wife during the first wife's lifetime but the marriage was not, in fact, polygamous. With effect from May 18, 1955, the Hindu Marriage Act, 1955, made it impossible for the marriage even to become polygamous in fact. *Held,* that, from May 18, 1955, the claimant became the wife of her husband within the meaning of the National Insurance Acts and that she was entitled to maternity grant by virtue of his insurance: Decision No. R(G) 2/56.

### Finance

*Accounts.* The accounts have been published of the National Insurance Fund, the N.I. (Reserve) Fund, the Industrial Injuries Fund and the N.I. (Existing Pensions) Fund, for the year ended March 31, 1955; together with the Report of the Comptroller and Auditor-General thereon (H.C. 230 of 1955–1956).

The Fifth Interim Report by the Government Actuary for 1954–1955 has been published together with a Report on the sickness experience of insured persons in the years 1949 to 1952 (H.C. 274 of 1955–1956).

## NATIONAL INSURANCE (INDUSTRIAL INJURIES)

### Decisions of the Commissioner and the Tribunal

*Accident.* Under the National Insurance (Industrial Injuries) Act, 1946, s. 7, a claimant must show, *inter alia,* that personal injury was caused by accident arising out of and in the course of his employment.

Claimant worked in a machine shop in the vicinity of a machine which repeatedly produced explosive reports any one of which might have presaged a more serious explosion. He developed a psycho-neurotic condition and a connected affection of the skin. Although he claimed and was paid sickness benefit in respect of the resulting incapacity he did not claim industrial injury benefit until nearly two years after the onset of incapacity. *Held*, (a) that the incapacity was the result of injury by accident (*Selvage* v. *Burrell & Sons* applied); (b) that the claimant had reasonable cause for his delay in claiming injury benefit: Decision No. R(I) 43/55.

*Assessment*. Under the Act of 1946 (above) s. 36 (1) (*c*), a medical board or medical appeal tribunal must determine, *inter alia*, at what degree the extent of disablement resulting from a loss of faculty is to be assessed, and what period is to be taken into account by the assessment.

A Medical Appeal Tribunal gave an assessment of disablement of 20 per cent. provisionally for seven months in respect of a back injury, to run concurrently with an assessment for life of 15 per cent. in respect of herniae, in relation to a claimant who had suffered both conditions as a result of one accident. The Local Appeal Tribunal treated this as an assessment of 35 per cent. for seven months followed by an assessment of 15 per cent. for life. *Held*, that no award could properly be made on the basis of the Medical Appeal Tribunal's decision and that an assessment on which an award could properly be founded should, in respect of any period, be one assessment embracing the whole extent of the loss of faculty resulting from all the injuries caused by the relevant accident: Decision No. R(I) 42/55.

*Incapable of following regular employment*. For the statutory provision (s. 14 (1) ) see R(I) 33/55 (above, pp. 159–160).

A coalminer, in receipt of disablement benefit and special hardship allowance following an industrial accident, was awarded disablement benefit in respect of pneumoconiosis. The pneumoconiosis would have rendered him incapable of following his regular occupation if he had not already been so incapable as the result of the industrial accident. He claimed special hardship allowance on account of his loss of faculty due to the pneumoconiosis. *Held*, that the claimant was not incapable of following his regular occupation due to pneumoconiosis during the time he remained incapable of following that same regular occupation as the result of the industrial accident: Decision No. R(I) 2/56.

A miner, aged sixty-three, suffered partial loss of sight of one eye in an industrial accident. He did not resume his regular occupation because of a fear of losing the sight of his good eye in another accident. *Held*, that he was not incapable of following his regular occupation. The total loss of vision in his good eye would not mean total blindness, the test used in Decision R(I) 66/52 to decide whether incapacity to follow a regular occupation can be based on apprehension of risk. Decision R(I) 85/52 compared: Decision No. R(I) 8/56.

"*In-patient in a hospital*." Under the Act of 1946, s. 16, as amended by the N.I. (Industrial Injuries) Act, 1953, "where a person is awarded disablement benefit, but the extent of his disablement is assessed for the period taken into account by the assessment at less than a hundred per cent. it shall be treated as assessed at a hundred per cent. for any part of that period during which he receives approved hospital treatment." Under the Act of 1946, s. 34 (2), "references in this Act to a person receiving approved hospital treatment shall be construed . . . as referring to his receiving, as an in-patient in a hospital or similar institution, with the approval of the Minister medical treatment for the relevant injury or loss of faculty."

Claimant, an in-patient in a National Health Service rehabilitation centre, was sent home whilst the centre was closed. For ten days he continued his treatment, exercises, at home. He returned to the centre when it re-opened.

*Held*, that whilst the claimant was at home he was not "an in-patient in a hospital or similar institution" and, therefore, was not in receipt of approved hospital treatment within the meaning of section 34 (2) of the Industrial Injuries Act. The two periods as an in-patient could not be linked and treated as continuous under regulation 19 (2) of the Industrial Injuries (Benefit) Regulations: Decision No. R(I) 14/56.

*New intervening cause.* Claimant, not fully recovered from the effects of an industrial accident and unable to do his full work, slipped and suffered further injury going to work on the day he resumed employment. *Held*, that injury benefit was payable. The claimant's incapacity for work was demonstrated and prolonged by the incident in question. The Tribunal of Commissioners discussed "second accidents": Decision No. R(I) 3/56.

*"Out of and in the course of employment."* For the statutory provision (s. 7) see R(I) 43/55 above. Under the Act of 1946, s. 8, an accident is deemed to arise out of and in the course of employment notwithstanding that the insured person is acting without instructions from his employer if (a) the accident would have been deemed so to have arisen had the act not been done without instructions from his employer, and (b) the act is done for the purposes of and in connection with the employer's trade or business.

Claimant was employed at a quarry and was detailed at different times to work either as a hole-borer or as a dumper-driver. On a day when he had been directed to the former work, he took over driving a dumper from a fellow workman and, whilst driving it, met with an accident. *Held*, that the driving of a dumper was within the scope of the claimant's employment and for the purposes of the employer's business; by virtue of section 8 of the Act, the accident was deemed to have arisen out of and in the course of the claimant's employment: Decision No. R(I) 41/55.

A laundry worker was injured when she went, before clocking-in, to deposit her own personal washing in the sorting room of the laundry where she was employed. Employees could have their own washing done at cheap rates, but they were not obliged or expected to do so as a condition of employment. *Held*, that the accident did not arise out of and in the course of the claimant's employment: her presence at the scene of the accident was for her own purpose and convenience. Decision R(I) 53/54 distinguished: Decision No. R(I) 45/55.

The town clerk to an urban district council attended in his official capacity a supper held by the local Workmen's Institute, and made a short speech, during which he suffered a very small rupture of an aneurism of the left anterior cerebral artery. An extensive rupture of the aneurism, causing death, occurred in hospital where he was under observation some weeks later. *Held*, that the deceased's attendance at the supper, and the making of a speech there, were not acts arising in the course of his employment as town clerk: Decision No. R(I) 1/56.

Claimant, whilst driving an omnibus, was stung by a wasp. Because of the need to concentrate on driving he had no reasonable means of avoiding the wasp's attack. *Held*, that the claimant suffered personal injury by accident arising out of and in the course of his employment. He was exposed to a special risk due to the conditions under which he was working: Decision No. R(I) 5/56.

A sub-postmaster, also self-employed as a grocer, was fatally injured whilst transacting business from a delivery van which he used in connection with his grocer's business and from which he sometimes transacted post office business. *Held*, that the accident did not arise out of and in the course of his employment as sub-postmaster. Transacting post office business from a delivery van at a distance from the sub-post office would not be an action within, or reasonably incidental to, his terms of employment: Decision No. R(I) 6/56.

Claimant, elected as a delegate by employees, was summoned to a meeting with representatives of the employers. The meeting was held in another factory of the same firm. While on her way there after finishing her day's work at the factory where she was employed, claimant was injured when her bicycle skidded in a public road. *Held,* that the accident did not arise out of and in the course of the claimant's employment. Decision R(I) 74/52 compared and decision R(I) 63/51 distinguished: Decision No. R(I) 10/56.

A lorry driver delivering bricks was required to assist the builder's men in the unloading. In helping to remove a concrete mixer from a site where the bricks were to be stacked he sustained an injury. *Held,* that the claimant suffered injury caused by accident arising out of and in the course of his employment. Removing the concrete mixer was something incidental to his employment. Decision C.I. 280/49 (reported) compared: Decision No. R(I) 11/56.

The secretary of a mission society which sends workers to hold open-air meetings at places where crowds congregate was injured by lightning while sheltering from a storm. *Held*, that the accident did not arise out of the claimant's employment. He shared the risk of being struck with all persons in the locality: Decision No. R(I) 12/56.

"*Personal injury*." For the statutory provision (s. 7), see R (I) 43/55 above.

A coal miner suffered an accident at work and broke off the foot of his artificial leg. *Held*, that the claimant did not suffer personal injury by accident arising out of and in the course of his employment. Damage to an artificial limb does not constitute personal injury: Decision No. R(I) 7/56.

*Pneumoconiosis.* The cause of death of a boiler lagger was certified to be "cor pulmonale due to chronic bronchitis and emphysema." Prior to his death he had been in receipt of a 70% industrial disablement pension in respect of asbestosis (a type of pneumoconiosis). *Held*, on the medical evidence, that death did not result from pneumoconiosis. Post-mortem examination showed no evidence of fibrosis of the lungs which is an essential element of asbestosis: Decision No. R(I) No. 9/56.

*Prescribed disease.* Under N.I. (Industrial Injuries) (Prescribed Diseases) Regulations, 1948 (S.I. 1948 No. 1371, as amended by S.I. 1951 No. 305), tuberculosis is prescribed disease 38. For a particular claimant to show that the disease is prescribed in relation to himself, he may show that he was "in attendance upon a person or persons suffering from tuberculosis where the need for such attendance arises by reason of physical or mental infirmity."

A clerk employed by a Hospital Management Committee became incapable of work by reason of tuberculosis. His duties included interviewing and assisting chronic and mental patients with their personal affairs. He assisted a number of them regularly with their pension books, collected the pensions, arranged for payments of rent and insurance premiums and dealt with other matters regarding their homes and financial business. *Held*, that tuberculosis was prescribed in relation to the claimant—his employment was in a service ancillary to the medical treatment of persons suffering from tuberculosis and constituted attendance upon such persons necessitated by their infirmities. Decisions R(I) 16/52, R(I) 57/52 and R(I) 2/55 distinguished, and Decisions R(I) 87/52 and R(I) 61/53 compared: Decision No. R(I) 44/55:

*Procedure.* Under the Act of 1946, s. 47 (1) no appeal from a local tribunal to the Commissioner shall lie without leave of the tribunal or the Commissioner. *Held*, that an application for leave to appeal to the Commissioner from a decision of a local tribunal under the Industrial Injuries Acts should be considered by a tribunal, constituted in accordance with the Determination of Claims and Questions Regulations, and not by a chairman alone. Decision R(I) 20/55 referred to: Decision No. R(I) 4/56.

*Reasonable cause for delay.* See R(I) 43/55 under *Accident* above.

"*Regular employment.*" Under the Act of 1946, s. 14, the weekly rate of a disablement pension is increased if as a result of the relevant loss of faculty the beneficiary is incapable and likely to remain permanently incapable of following his regular employment (which is to be taken as not including any subsidiary occupation of his).

A jobbing mason who renovated property for a farmer was employed for various periods as a farm labourer to assist with the harvests. While so employed he suffered an industrial accident and was awarded disablement benefit and special hardship allowance on the basis of a regular occupation as self-employed mason. On consideration of renewal, the increase was disallowed on the ground that the claimant's regular occupation was not insurable for the purposes of the National Insurance (Industrial Injuries) Acts. *Held,* that the claimant was entitled to an increase of disablement pension on the ground that the absence of any reference to insurable employment in section 14 (2) (*a*) implied that the expression "regular occupation" was not confined to such employment. (Decision R(I) 54/54 not to be followed): Decision No. R(I) 15/56.

### Employers' responsibilities

A motion in the House of Lords, followed by a debate, drew attention to the increased responsibilities of employers of labour in respect of accidental injury to employees, to the increase in common law actions in respect of such accidents, and in particular to the effects of certain provisions of the Legal Aid and Advice Act, 1949 (197 H.L. Deb. 129–181, May 3, 1956).

### Finance

*Accounts.* The accounts have been published of the Industrial Injuries Fund for the year ended March 31, 1955 (H.C. 230 of 1955–1956).

The Fifth Interim Report by the Government Actuary for 1954–1955 has been published (H.C. 292 for 1955–1956).

### Statistics

*Claims.* The Minister of Pensions and National Insurance gave the numbers of claims and the percentage of appeals under the Industrial Injuries Act for each of the years from 1950 to 1955. In 1950 the number of claims was 886,000 and the percentage of appeals 0·82; in 1955 the figures were 970,000 and 0·73 (553 H.C. Deb. 688–689, June 4, 1956).

## NATIONALISED INDUSTRIES

### General

*Accountability.* The Prime Minister stated that the Government had considered the Special Report from the Select Committee on Nationalised Industries and proposed to set up a Select Committee with new terms of reference, namely:—"To examine the Reports and Accounts of the nationalised industries established by Statute whose Controlling Boards are appointed by Ministers of the Crown and whose annual receipts are not wholly or mainly derived from moneys provided by Parliament or advanced from the Exchequer"; and that the necessary Motion would shortly be placed on the Order Paper when there would be an opportunity to debate the matter (552 H.C. Deb. 1423–1424, May 10, 1956).

### Airways

*Guarantees.* The Treasury issued statements of guarantees on loans proposed to be raised by the British European Airways Corporation (H.C. 251 of 1955–1956) and the British Overseas Airways Corporation (H.C. 252 of 1955–1956).

*Members.* The Minister of Transport and Civil Aviation stated that he had appointed Mr. Gerard D'Erlanger as Chairman of B.O.A.C. for five years from May 1 and Sir Miles Thomas's resignation (see above, p. 162) would now take effect on April 30; that he had concluded that the Chairman should not hold the office of Chief Executive nor be required to give whole-time service; that Mr. D'Erlanger had agreed to serve on this basis and had generously asked that he should receive no salary; that he (the Minister) had appointed Sir George Cribbett to be a full-time Deputy-Chairman from May 1 and had regretfully agreed to the request of Lord Rennell of Rodd, a part-time Deputy-Chairman, that he be allowed to resign. Mr. G. R. Strauss asked the Minister if he had studied the facts leading to the refusal by a previous Minister of Transport to re-appoint Mr. D'Erlanger, after a short tenure of office as Chairman of B.E.A. to that post. The Minister replied that he had studied these facts and was satisfied that they were greatly to the credit of Mr. D'Erlanger; that the Government took the view that it was much in the commercial interest of the Corporation that the Chairman should have wide outside interests which, no doubt, would help the commercial future of these very competitive international businesses; that Sir Miles Thomas had a £1,000 expenses account and that no doubt Mr. D'Erlanger would enjoy the same benefits; that it was the job of the Chairman and the managing director (Chief Executive) to be abroad and therefore there must be a third, full-time, responsible member of the Board who could be at home carrying out the day-to-day duties of the Corporation (551 H.C. Deb. 1315–1320, April 20, 1956; see also *The Times,* April 20, 1956). Subsequently Lord Rennell, at his own request, was re-appointed as a part-time member of the Corporation until 1958. Mr. Basil Smallpeice was appointed managing director; he has been deputy chief executive since June, 1954; he continues to be a member of the Corporation (*The Times,* May 2, 1956). The Minister stated that there was no intention to merge the two Corporations, to denationalise them or to dismember them (552 H.C. Deb. 1215, May 9, 1956). The House of Lords debated the " recent changes in the British Overseas Airways Corporation " on May 15, 1956 (197 H.L. Deb. 405–451).

The Minister stated that the Chairman would give as much of his time to the affairs of B.O.A.C. as was necessary to carry out to the full his heavy responsibilities; this would mean for the present that his duties would be practically full time (552 H.C. Deb. 2004, May 16, 1956).

The Minister has appointed Mr. A. H. Milward who on May 3, 1956, became Chief Executive of British European Airways Corporation, a full-time member of the Corporation (*The Times,* May 4, 1956). The Minister has appointed Sir Patrick Dollan a part-time member of the B.E.A.C. for two years from June 1, 1956 (*The Times,* June 6, 1956).

*Minister's powers.* The Minister of Transport and Civil Aviation, being asked which matters of B.O.A.C.'s policy were reserved for decision between the Chairman and himself and which were decided by the full Board of the Corporation, replied that under section 19 of the Air Corporations Act, 1949, he must consult the Chairman before directing the disposal of any excess revenue; that apart from this there were no matters reserved for settlement between the Chairman and the Minister; that the chain of command was that the Minister was responsible to the House and the Chairman was responsible to the Minister; but that the Chairman, before coming to the Minister, discussed, cleared and brought to the Minister the collective decision of the Board; and that he believed it would be absolutely wrong for any Minister to deal other than through the Chairman who must be directly and solely responsible to the Minister (552 H.C. Deb. 1220–1221, May 9, 1956).

### Atomic Energy

*Balance sheet.* The first balance sheet has been published of the United Kingdom Atomic Energy Authority for the period from August 1, 1954, to

March 31, 1955, together with the Report of the Comptroller and Auditor-General thereon, but the operating account is withheld from publication " in the interests of national security " (H.C. 283 of 1955–1956).

### Coal

*Accounts.* The account has been published of the sums issued out of and received from the Consolidated Fund and of the sums received from the National Coal Board in respect of interest and repayment of advances and recoupment of Crown expenses and liabilities, and of the disposal of those sums respectively, for 1954–1955; together with the Report of the Comptroller and Auditor-General thereon (H.C. 286 of 1955–1956). (And see below, *Report.*)

*Borrowing.* During the Second Reading debate on the Coal Industry Bill (which seeks to increase from £300m. to £650m. the total outstanding advances of the National Coal Board), Mr. Nabarro moved a reasoned amendment with the support of thirty-six other Conservative Members. On the division, twenty-five Conservative Members voted against the Bill which is supported by the Opposition (552 H.C. Deb. 1430–1542, May 10, 1956).

*Report.* The Annual Report and Statement of Accounts of the National Coal Board for 1955 have been published (H.C. 263–1 and 263–2 of 1955–1956).

### Electricity

*Guarantees.* The Treasury issued statements of guarantee on loans proposed to be raised by the Central Electricity Authority (H.C. 253 of 1955–1956), the North of Scotland Hydro-Electric Board (H.C. 256 and 279 of 1955–1956), and the South of Scotland Electricity Board (H.C. 255 of 1955–1956).

### Gas

*Guarantees.* The Treasury issued a statement of guarantee on loans proposed to be raised by the Gas Council (H.C. 254 of 1955–1956).

### Transport

*Canals and inland waterways.* See next paragraph.

*Charges.* On February 21, 1956, the British Transport Commission asked the Minister of Transport and Civil Aviation to make regulations under section 82 of the Transport Act, 1947, empowering the Commission to increase their railway freight charges by ten per cent. in the normal case and by fifteen per cent. and twenty-five per cent. in two special cases, and to increase their dock and canal charges by seven-and-a-half per cent., with an estimated additional revenue in a full year of £248m. The Minister, in accordance with section 82, asked the advice of the permanent members of the Transport Tribunal, acting as a consultative committee. The Minister told the tribunal that in his view it would be expedient that the increases should, for the following six months, be limited to one-half of those proposed by the Commission, except that for dock and canal charges the increase should be five per cent. instead of seven-and-a-half per cent. On April 3, 1956, the Tribunal replied in a memorandum which concluded: " We think that in the light of the past history and present prospects of the Commission it is plainly necessary that they should be enabled to take all such measures as are available to stay the progressive deterioration of their financial position and that the increases for which they have sought your sanction are urgently necessary if this object is to be attained. We recommend accordingly that regulations be made authorising the increases proposed by the Commission."

On April 11, 1956, the Minister stated that the Government, for the reasons which he gave on March 19, 1956 (see above, p. 164) still considered that it was in the national interest to authorise for an interim period of six months lower increases than those recommended (551 H.C. Deb. 183–191, April 11, 1956). Accordingly there were made on April 11, and laid before Parliament on April 16, the Harbours Docks and Piers (Additional Charges) (Amendment) Regulations, 1956 (S.I. 1956 No. 548), the Railways (Additional Charges) (Amendment) Regulations, 1956 (S.I. 1956 No. 549) and the Canals (Additional Charges) (Amendment) Regulations, 1956 (S.I. 1956 No. 550) which came into operation on April 23. These were in accordance with the Minister's statement. Thus those relating to railways authorised increases of five per cent., seven-and-a-half per cent., and twelve-and-a-half per cent. On May 17, the House of Commons debated these regulations on a motion to annul, which was subsequently withdrawn (552 H.C. Deb. 2347–2378).

An Order of the Transport Tribunal dated May 11, 1956, altered the British Transport Commission (Passenger) Charges Scheme, 1954. The Order substituted the words "second-class" for "third-class" in paras. 6, 7, 9, 10, 18 and Schedules 2, 3, 4, 5, 12 and 13 and new paras. for paras. 16, 23, 25, 27, 38 (a) and 39 (a) and amended Schedule 9 (S.O. Code No. 88—93—2*).

*Guarantee.* The Treasury issued a statement of guarantee on stock issued by the British Transport Commission (H.C. 248 of 1955–1956).

*Members.* The Minister has appointed Mr. J. W. Watkins a full-time member of the British Transport Commission. On taking up appointment he relinquishes his position as general manager of the London Midland Region (*The Times*, May 30, 1956).

*Reports.* The Eighth Annual Report, Statement of Accounts and Statistics of the British Transport Commission for 1955 have been published (H.C. 290—I and 290—II of 1955–1956).

The Annual Reports of the Central Transport Consultative Committee for Great Britain for 1955 (H.C. 300 of 1955–1956), the Transport User's Consultative Committee for Scotland for 1955 (H.C. 301 of 1955–1956) and the Transport Users' Consultative Committee for Wales and Monmouthshire (H.C. 302 of 1955–1956) have been published.

The Report of the Road Haulage Disposal Board for the six months ended May 28, 1956, has been published (H.C. 304 of 1955–1956).

## NORTHERN IRELAND

### Parliament

*Speaker.* Sir Norman Stronge was elected Speaker of the House of Commons on April 26, 1956. Sir Norman Stronge had resigned when the question arose of his eligibility to be a Member of Parliament (see above, p. 143).

## PARLIAMENT

### Broadcasting

*Anticipation of debates.* On February 9, 1956, a Select Committee of the House of Commons was appointed to consider whether any changes were desirable in the present methods of giving effect to the principle that there should be some limitation to the anticipation of parliamentary debates by broadcasting. The Report of the Committee has been published. Amongst its conclusions are: (1) That any restrictions should be reduced to the smallest extent that is practicable; (2) that the only justification which can be claimed for any policy of limitation is the necessity of upholding the primacy of Parliament in debating the affairs of the nation; (3) that the Government should take the responsibility of laying down and enforcing any restriction which Parliament may deem necessary; (4) that in future any limitation upon anticipation should apply only from the time of the announcement of business, and that the limitation should not begin to operate until seven days before the business in question is to be taken; (5) that the limitation applying the prohibition to all legislation in the current session is unnecessary and undesirable and that in the case of a Bill that has passed its Second Reading, no restriction should apply at all; (6) that Members should be treated in exactly the same way as other persons in the administration of any restriction upon broadcasting in sound or television; (7) that the proposed restriction should be embodied in a prescription issued by the Postmaster-General and the prescription should be so drafted as to allow for relaxation at his discretion in individual instances; (8) that the House should appoint, at any rate for an experimental period, a small committee or panel of Members to advise the Postmaster-General in connection with any application for relaxation; (9) that the prescription should not apply to overseas broadcasts; (10) that the B.B.C. has not been subjected to any improper pressure from Government or Opposition Whips or by Party organisations and can safely be relied on to defend itself from political interference. (Report from the Select Committee on Broadcasting (Anticipation of Debates) together with the Proceedings of the Committee, Minutes of Evidence and an Appendix (H.C. 288 of 1955–1956).)

**Members**

*Allowances.* The Secretary to the Treasury stated that on July 29, 1954 (one month after the introduction of the sessional allowance scheme) the number of Members not claiming sessional allowance was 194; on May 9, 1956, the figure was 33 (552 H.C. Deb. *132,* May 11, 1956; and see 554 H.C. Deb. *134*, June 22, 1956).

*Salaries.* The Leader of the Opposition and the Leader of the Liberal Party in a letter to the Prime Minister expressed their view that the time had come to invite an independent committee of persons, who were not Members of Parliament, to consider and make recommendations on the level of remuneration and allowances to be paid to Members and what pension arrangements should be provided (*The Times*, June 8, 1956). The Prime Minister refused this request. He stated that the Government had reconsidered the whole situation and had decided that, at the time when the Government were calling for restraint in wage and salary demands, it would be wrong for Ministers or Members " who are rightly expected to set an example " to increase their own remuneration; he added that as soon as they judged the occasion opportune the Government would be ready to discuss ways and means with the leaders of the other parties, " bearing in mind the desirability of Parliament itself retaining control of these matters " (*The Times*, June 16, 1956).

**Procedure**

*Privy Councillors.* Replying to a Question about the custom whereby Privy Councillors have priority when they wish to speak, Mr. Speaker stated that the custom was of great antiquity and that the practice could only be changed after a motion had been carried by the House (551 H.C. Deb. 1778–1780, April 25, 1956). Subsequently a Motion urged the Government to move for a Select Committee to consider and report on this and other matters; the Lord Privy Seal undertook to consider it (553 H.C. Deb. 1284–1285, June 7, 1956).

*Questions to Ministers.* Mr. Speaker stated that a Question which has already been fully answered in the course of a Session cannot be asked again. Included in the category of Questions which already have been answered are those to which a Minister has refused to give an answer (553 H.C. Deb. 34, May 29, 1956).

*Select Committee.* The Prime Minister stated that the House would be asked to agree to the appointment of a Select Committee to inquire into the practice of moving amendments on going into Committee of Supply on the Service Estimates, the numbers required for a quorum and for the Closure in Standing Committees, the constitution of the Scottish Standing Committee and the question of Money Resolutions (554 H.C. Deb. 761, June 14, 1956).

*Written answers.* The Lord Privy Seal stated that the instructions to Departments were that a Question for Written Answer should be answered as speedily as possible and certainly not later than seven days from the date for which the Answer is requested (552 H.C. Deb. 1836, May 15, 1956).

See also SUBORDINATE LEGISLATION (p. 279, below).

## PRACTICE

### Crown Practice

*Litigant in person.* The governors of a voluntary aided school subject to an instrument and articles of government made under the Education Act, 1944, sought the consent of the London County Council, as education authority, to dismiss the headmaster of the school. The council appointed a sub-committee to consider the matter. At the hearing the parties were represented by counsel and witnesses were called to support the governors' contentions that the headmaster was too strict a disciplinarian and that his punishments were unreasonable. After a three-day hearing the sub-committee decided that there was no case for granting the council's consent. *Held,* on appeal from a decision of the Divisional Court ([1955] C.L.Y. 915) refusing an application by the governors for an order of certiorari to quash the decision of the sub-committee, (1) the Court of Appeal would not refuse to hear an application for a prerogative writ by a litigant in person; (2) the fact that the governors had sought the ruling of the Minister of Education did not debar them from pursuing their remedy of appeal to the Court of Appeal; but (3) whether or not certiorari would lie from the proceedings of the sub-committee, there was no foundation for saying that the sub-committee had acted contrary to the principles of natural justice; therefore, the appeal must be dismissed: R. *v.* STAFF SUB-COMMITTEE OF LONDON COUNTY COUNCIL'S EDUCATION COMMITTEE, *ex p.* SCHONFELD [1956] 1 W.L.R. 430; [1956] 1 All E.R. 753n., C.A.

*Privilege.* The Lord Chancellor made a statement on the policy of the Government in relation to the claiming of Crown privilege for documents and oral evidence. He said, *inter alia,* (1) That, in accident cases, where a Department was sued, the most relevant documents were the reports of employees, eye witnesses, reports by foremen, superintendent and other officials on such matters as the state of the machinery, premises or vehicle involved; privilege would not be claimed for these documents. (2) That ordinary medical records kept by Departments in respect of the health of civilian employees should not be privileged; but medical reports and records in the Fighting Services should be, so far as proceedings between private litigants, usually matrimonial proceedings, were concerned. (3) That, where the Crown or the doctor employed by the Crown was sued for negligence, privilege should not be claimed. (4) That where medical or other documents were relevant to the defence in criminal proceedings, privilege should not be claimed (197 H.L. Deb. 741–748, June 6, 1956).

The Law Reform Committee of the Bar Council has made a report on this subject, which has been adopted by the Bar Council (Annual Statement of the Bar Council, 1955, p. 12).

## PUBLIC AUTHORITIES

### Agricultural Land Commission

*Accounts.* The accounts of the management and the farming of land by the Commission and the Welsh Agricultural Land Sub-Commission have been published for the year ended March 31, 1955, together with the Report of the Comptroller and Auditor-General thereon (H.C. 244 of 1955–1956).

**Ancient Monuments Boards**

*Reports.* The annual Reports of the Boards for England, Scotland and Wales for 1955 have been published (H.C. 310 of 1955–1956).

**Dental Council**

*Establishment.* The Dentists Act, 1956 (4 & 5 Eliz. 2, c. 29), sets up a General Dental Council " whose general concern it shall be to promote high standards of professional education and professional conduct among dentists " (s. 1 (1) ). The Dental Board of the United Kingdom is dissolved and its property rights and liabilities are transferred to the Council. The Act came into force on July 4, 1956 (S.I. 1956 No. 624). (See also p. 280, below.)

**Forestry Commission**

*Report.* H.M. Forestry Commissioners (Chairman: R. L. Robinson) have issued a report on post-war Forest Policy (Cmd. 6447).

**Herring Industry Board**

*Report.* The 21st Annual Report of the Board, for 1955, has been published (Cmd. 9765).

**Iron and Steel Holding and Realisation Agency**

*Minute.* The Treasury have issued a minute dated April 5, 1956, consenting to a proposal by the Agency to sell its holding of securities in the Briton Ferry Steel Co., Ltd., to Duport, Ltd., for £2,300,000 (Cmd. 9740).

**Metropolitan Water Board**

*Constitution.* The Minister of Housing and Local Government has made an Order reconstituting the Board and Regulations governing the appointment of joint committees and members (S.I. 1956 Nos. 881 and 886).

**National Assistance Board**

*Report.* The Report for 1955 has been published.

**National Film Finance Corporation**

*Report.* The Annual Report and Statement of Accounts for 1955–1956 have been published (Cmd. 9751).

**Powers**

*Statutory purpose.* The Court of Appeal affirmed the decision of the Divisional Court (reported above, pp. 169–170) in BRITISH TRANSPORT COMMISSION *v.* WESTMORLAND COUNTY COUNCIL; SAME *v.* WORCESTERSHIRE COUNTY COUNCIL [1956] 2 W.L.R. 1022; [1956] 2 All E.R. 129.

**Public Relations**

*Debate.* The House of Commons, on June 8, 1956, debated a motion calling attention to the growth in the power of public authorities and the need for improved public relations (553 H.C. Deb. 1491).

**War Damage Commission**

*Legal nature.* " Parliament has recently shown an increasing fondness for creating quasi-corporations, *i.e.,* bodies different from the aggregate of the members, *e.g.,* a members' club, and yet not corporations in the language of jurisprudence. In my judgment the War Damage Commission is just such a quasi-corporation, though counsel have argued with much enthusiasm that it is nothing but the aggregate of its members. The War Damage Act, 1943 . . . Schedule I . . . para. 7 provides: 'The Treasury may appoint a secretary to the Commission, and the Commission may appoint such deputy commissioners and other officers, and such servants, as the Treasury may determine.' I stress that. It seems to me to differentiate the Commission from the mere aggregate of members who could appoint any officers or servants they liked. Paragraph 8 provides: 'There shall be paid out of moneys provided by Parliament to the members, officers and servants of the Commission such remuneration . . . and such allowances as the Treasury may determine.' I stress that, too, as Parliament does not usually pay to provide servants for an aggregate of individuals" (*per* Roxburgh J.): INLAND REVENUE COMMISSIONERS *v.* BEW ESTATES, LTD. [1956] 3 W.L.R. 139 at 144–145; [1956] 2 All E.R. 210.

See also SMITH *v.* EAST ELLOE R.D.C. (p. 249, above).

## REMEDIES

### Certiorari

*Discretionary remedy.* The applicant pleaded guilty to two offences against regulation 5 (*b*) of the Timber Cargo Regulations, 1932, by loading a cargo of timber at too great a height in two parts of the vessel of which he was master. He was fined £500 and £250. He moved for an order of certiorari to quash the second conviction and fine, and contended that the regulations did not provide for more than one offence in respect of the whole cargo carried by the ship. *Held,* as a matter of construction, the regulations did not create two distinct offences; but certiorari depended on jurisdiction and it could not be said that there was no jurisdiction in this case; accordingly, the application must be refused: R. *v.* CAMPBELL, *ex p.* NOMIKOS [1956] 1 W.L.R. 622; [1956] 2 All E.R. 280, D.C.

### Declaration

*Availability.* In TAYLOR *v.* NATIONAL ASSISTANCE BOARD [1956] 3 W.L.R. 290, Lord Merriman P. said, at 298–299, "At the outset Mr. Winn [for the Board] took the preliminary point that the regulations provide that the Board's computation of disposable income of an applicant is to be final, and although he did not dispute that the finality of the computation can be challenged if it is shown to be contrary to the statute and the regulations made thereunder he submitted that the challenge should be made by certiorari, and not by an originating summons under R.S.C. Ord. 54A." Rejecting this argument, Lord Merriman said: "If the applicant be right in her contention, she has been adversely affected by the wrongful imposition on the offer of a civil aid certificate of the obligation to make a monetary contribution, computed in a manner contrary to the true construction of the relevant statute and regulations." Lord Merriman continued by quoting from the judgment of Denning L.J. in *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18 at 41 including the passage: "I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself; and the court should not, I think, tie its hands in this matter of statutory tribunals."

### Habeas Corpus

*Mental defective.* Section 2 (1) of the Mental Deficiency Act, 1913, provides that a person who is a [mental] defective "may be dealt with under this Act by being sent to or placed in an institution for defectives or placed under guardianship . . . (*b*) if in addition to being a defective person he is a person—(i) who is found neglected, abandoned, or without visible means of support, or cruelly treated."

R., a border-line high grade mental defective, was brought up in a poor law institution. She went to ordinary schools. When she left school she was employed at the institution but did not give satisfaction. Once she was seventeen there was no power to detain her and as it was feared that she was about to leave, she was removed to a mental institution under a "place of safety" order in June, 1948. Later a petition was presented to a magistrate under the Mental Deficiency Acts, 1913 to 1927, asking for a reception order to be made detaining R. in the mental institution. The magistrate made the order on the ground that R. was a mental defective subject to be dealt with under the Acts by reason of being "found neglected." R. applied for a writ of habeas corpus on the ground that she was not subject to the Acts. The respondents contended that, as R. could not receive the special care and training necessary for her in the poor law institution, she could rightly be described as "found neglected" and that therefore there was power to make the order. *Held*, R. was not a mental defective "found neglected" within the meaning of section 2 (1) (*b*) of the Act of 1913, and the magistrate had no power to make the order; therefore, she must be released: R. *v.* BOARD OF CONTROL, *ex p.* RUTTY [1956] 2 W.L.R. 822; [1956] 1 All E.R. 769, D.C.

## SCOTLAND

### Administration

*Handbook.* The Scottish Office have published a revised version of a handbook first issued in 1950. It provides a general account of Scottish administrative arrangements, as they stand at present, for discharging the business of the central government (*A Handbook on Scottish Administration*).

### Agriculture

*Report* for 1955 has been published (Cmd. 9745).

### Appointment of Counsel

*Debate.* The question was raised on the adjournment in the House of Commons of the appointment of senior Counsel to the Secretary of State under the Private Legislation Procedure (Scotland) Act, and it was urged that the junior Counsel should have been appointed (553 H.C. Deb. 1480, June 7, 1956).

### Education

*Report.* The Secretary of State for Scotland has published the Report on Education in Scotland in 1955 (Cmd. 9722).

### Fire Services

*Report.* H.M.'s Inspector of Fire Services for Scotland has published his Report for 1955 (Cmd. 9756).

### Fisheries

*Report* for 1955 has been published (Cmd. 9739).

### Health

*Reports.* The Department of Health for Scotland and the Scottish Health Services Council have published their Reports for 1955 (Cmd. 9742).

### Nationalist Party

*Political broadcasts.* The Scottish Nationalist Party, Plaid Cymru (the Welsh Nationalists), the Independent Labour Party and Common Wealth inaugurated a campaign for self-government for Wales and Scotland, decentralisation in England and the end of the ban on regional political broadcasts. Subsequently a deputation, organised by Plaid Cymru, was received by the Postmaster-General. The Five-Party Committee (the Fellowship Party having joined) later proposed that parties which have contested a total of twenty-five parliamentary seats and polled an aggregate of 100,000 votes in their history should be included in the broadcasting and television programmes. The Scottish Nationalists claimed that a purely Scottish party should qualify for election broadcasting on contesting one-ninth of the number of seats otherwise necessary (*The Times*, April 2 and 17, May 18, 1956).

See also LOCAL GOVERNMENT (p. 256, above).

## SUBORDINATE LEGISLATION

### Parliamentary proceedings

*Debate.* On a motion to annul the Teachers' Superannuation (Approved External Service) Amendment Rules, 1956 (S.I. 1956 No. 262) to which the attention of the House had been drawn by the Select Committee on Statutory Instruments (see below), the Parliamentary Secretary to the Ministry of Education promised that the Minister would make a new instrument revoking in part the one complained of (551 H.C. Deb. 154, April 10, 1956).

*Select Committee on Statutory Instruments* (*House of Commons*). On March 13, 1956, the Committee resolved that the special attention of the House be drawn to the Derbyshire (New Streets) Order, 1956, No. 153, on the ground that its form called for elucidation. The Committee also considered twenty instruments and resolved that it was unnecessary to draw the attention of the House to them. This was the Committee's Fourth Report (H.C. 16–XI of 1955–1956). On March 27, 1956, the Committee considered fifteen Instruments. The Committee ordered that the Lords Commissioners of the Treasury be requested to submit a Memorandum in explanation of the Control of Borrowing (Amendment) Order, 1956, No. 358. The Committee resolved that the special attention of the House be drawn to the Teachers' Superannuation (Approved External Service) Amending Rules, 1956, on the ground that they appear to make an unexpected use of the powers conferred in including an unauthorised sub-delegation. This was the Committee's Fifth Report. (H.C. 16—XII of 1955–1956).

On April 24, 1956, the Committee considered forty-five Instruments (including No. 358 referred to above) and resolved that it was unnecessary to draw the attention of the House to them. The Committee ordered that the Minister of Housing and Local Government be requested to submit a memorandum in explanation of the Town and Country Planning (County of Durham) Development Order, 1956, No. 529 (H.C. 16—XIII of 1955–1956).

On May 8, 1956, the Committee considered twenty Instruments (including No. 529 referred to above) and resolved that it was unnecessary to draw the attention of the House to them. The Committee ordered that the Secretary of State for the Colonies be requested to submit a memorandum in explanation of the Colonial Air Navigation (Amendment) Order, 1956, No. 615, and the Minister of Education similarly in explanation of the Provision of Clothing Amending Regulations, 1956, No. 559.

On June 5, 1956, the Committee considered eighteen Instruments (including No. 615 referred to above) and resolved that it was unnecessary to draw the attention of the House to them. The Committee ordered that the Secretary of State for Scotland be requested to submit a memorandum in explanation of the Scottish Milk Marketing Board (Modification of Functions) (Revocation) Order, 1956, No. 722; and the President of the Board of Trade similarly in explanation of the Iron and Steel Scrap Order, 1956, No. 631; and the Minister of Agriculture, Fisheries and Food similarly in explanation of the Fatstock (Guarantee Payments) (Amendment) Order, 1956, No. 399. The Committee resolved that the special attention of the House be drawn to the Provision of Clothing Amending Regulations, 1956, No. 559, on the ground that they appear to make an unexpected use of the powers conferred. This was the Committee's Sixth Report (H.C. 16—XV of 1955–1956).

On June 19, 1956, the Committee considered twenty Instruments (including Nos. 399, 631 and 722 referred to above) and resolved that it was unnecessary to draw the attention of the House to them (H.C. 16—XVI of 1955–1956).

## TRADE UNIONS

### Powers

*Expulsion of members.* The plaintiff had alleged that on July 6, 1955, contrary to the rules of the union and in purported compliance with a decision of the Trades Disputes Committee of the T.U.C.—which he alleged was not binding on him—the defendant union had purported to exclude him from membership. He further alleged that as trade union membership was a requisite of his employment as a registered dock worker, and the dock employers in the Port of Liverpool recognised only the Transport and General Workers' Union, his employment was in jeopardy unless he applied for membership and was accepted as a member by the T. & G.W.U. He stated that he was willing to pay up his contributions and resume membership of the defendant union. The union by its defence and counterclaim alleged that the plaintiff had been excluded from membership in compliance with an award of the T.U.C. Trades Disputes Committee, set up under the Bridlington agreement of 1939; and that the agreement was an implied term of the plaintiff's contract of membership. *Held*, (1) the purported action of the executive committee of the defendant union in excluding or causing the plaintiff to be expelled from membership was *ultra vires* and illegal, unconstitutional, and void; and (2) the plaintiff, notwithstanding such purported exclusion or expulsion from the union, was and had always been a member since April 2, 1955; accordingly, there must be judgment for the plaintiff: SPRING *v.* NATIONAL AMALGAMATED STEVEDORES AND DOCKERS SOCIETY [1956] 1 W.L.R. 585; [1956] 2 All E.R. 221, Sir Leonard Stone V.-C. (applying *Shirlaw v. Southern Foundries* (*1926*) [1939] 2 K.B. 206).

## TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

### General

*Committee.* The Committee on Administrative Tribunals and Inquiries (Chairman: Sir Oliver Franks) has published (1) Memoranda submitted by Government Departments in reply to a questionnaire; four volumes have so far appeared. (2) Minutes of Evidence; six volumes have so far appeared being the Minutes taken on first and second days; third and fourth days; fifth day; sixth and seventh days; eighth day; ninth and tenth days. The first eight days were occupied by Government Departments. On the ninth day evidence was given by Inns of Court Conservative and Unionist Society and on the tenth day by Trades Union Congress, Land Agents' Society, and Professor F. H. Lawson (the Memoranda and Minutes are published by H.M.S.O.).

### Disciplinary bodies

*Dental committees.* The Dentists Act, 1956 (see above, p. 276) provides that the General Dental Council shall set up a committee for the preliminary consideration of disciplinary cases and shall set up a Disciplinary Committee. The preliminary committee is to decide whether a case of a person alleged to be liable to have his name erased under the Dentists Act, 1878, s. 13, para. 2 (which relates to registered dentists convicted of crime or guilty of infamous or disgraceful conduct in a professional respect) ought to be referred to the Disciplinary Committee which, after inquiry, is empowered to erase a dentist's name from the register. The General Dental Council is empowered to make rules as to procedure and evidence in proceedings before the Disciplinary Committee and, *inter alia,* for providing that a party may be represented by counsel or solicitor. To advise the Disciplinary Committee on questions of law, an assessor is to be appointed by the General Dental Council, subject to rules made by the Lord Chancellor; the assessor must be a barrister, advocate or solicitor of not less than ten years standing. Appeal lies from the decision to erase a dentist's name to the Judicial Committee of the Privy Council.

The preliminary committee is to consist of the President and five other members of the General Dental Council of whom one shall be a person who is not a registered dentist. The Disciplinary Committee is to consist of the President and ten other members of the Council of whom at least four shall be elected members of the Council and at least two shall be neither elected members nor registered dentists. (For these and other details, see sections 6–11 and Schedule I, Part II, paras. 12, 13.)

*Medical committee.* Rule 63 of the Medical Disciplinary Committee (Procedure) Rules, 1951, provides: "The Committee . . . may, after consultation with the assessor to the committee, treat any statement of fact contained in any document as evidence of that fact." A record of criminal proceedings is a "document" within the meaning of the second limb of rule 63.

A Malayan doctor performed an operation of abortion on a Chinese woman which caused her death. He was convicted in the High Court of Malacca of an offence against the Malayan Penal Code and sentenced to imprisonment. At a subsequent inquiry before the Disciplinary Committee of the General Medical Council the committee decided that the attendance of witnesses from Malaya was not practicable and, accordingly, the solicitors on each side agreed to the committee proceeding on the documentary evidence of the trial. The committee decided that the doctor had been guilty of infamous conduct and that his name should be struck off the medical register. *Held,* on appeal, whether or not the committee were empowered by the Rules of Procedure of the General Medical Council to receive in evidence the whole of the officially authenticated proceedings of the convicting court in this class of case, the consent in the present case to the admission of the record was fatal to any objection to it, and there had been no miscarriage of justice; consequently, the appeal must be dismissed: ONG BAK HIN *v.* GENERAL MEDICAL COUNCIL [1956] 1 W.L.R. 515; [1956] 2 All E.R. 257, P.C. (applying *General Medical Council* v. *Spackman* [1943] A.C. 627).

### Lands Tribunal

*Jurisdiction.* See SOWERBY BRIDGE U. D. C. *v.* STOTT (above, p. 249).

### National Service

*Umpire's decisions.* Two selected decisions given by the Umpire in respect of applications for postponement of liability to be called up for service under the National Service Acts, 1948–1955, have been published by the Ministry of Labour and National Service (N.S. Code 2, Pamphlet No. 1/56* contains Decision No. 14/56 (N.S.); N.S. Code 2, Pamphlet No. 2/56* contains Decision No. 130/56).

### Rating and valuation

*Local valuation courts.* Regulations have been made prescribing the general procedure to be followed by local valuation courts in hearing rating appeals. They provide, *inter alia,* that the rating authority may appear by their clerk or other officer duly appointed for the purpose or by counsel or solicitor and that any other person entitled to appear may appear in person or by counsel or solicitor or by any other representative. The Regulations also provide a method for determining which court is to hear appeals relating to certain undertakings occupying properties in different areas (Rating Appeals (Local Valuation Courts) Regulations, 1956 (S.I. 1956 No. 632, revoking S.I. 1949 No. 2312)).

### WALES

**Plaid Cymru (the Welsh Nationalist Party)**

*Political broadcasts.* See p. 278, above.

**Status**

*Self-government.* Mr. G. Roberts, M.P., presented a Petition to the House of Commons, signed by 240,652 people of the Principality of Wales, expressing their strong conviction that the House, with its centralised form of legislative machinery, is precluded from adequately dealing with the distinctive national problem of Wales; that self-government within the framework of the United Kingdom should accrue to the good government both of Wales and of the other parts of the United Kingdom; and praying the House to promote an Act of Parliament to secure for Wales a Parliament with adequate legislative authority in Welsh affairs (551 H.C. Deb. 1587, April 24, 1956). Subsequently a deputation waited on the Home Secretary and Minister for Welsh Affairs and an agreed statement said that the Minister, who indicated that he agreed with the deputation in the matter of administrative devolution and was awaiting the report of the Council for Wales upon the investigation in which they had been engaged, said he would report to his colleagues in the Cabinet the representations which the deputation had made in amplification and support of the petition (*The Times*, April 27, 1956).

### WIRELESS AND TELEVISION

**Parliament**

*Anticipation of debates.* See above, p. 273.

**Political broadcasts**

*Minority parties.* See above, p. 278.

## COMMONWEALTH AND DEPENDENT TERRITORIES

**General**

*Elections.* The Secretary of State for the Colonies stated that the names of those entitled to vote at elections to the legislatures of the following Territories were registered on common rolls: Aden (Colony), Bahamas, Barbados, Bermuda, British Honduras, Falkland Islands, Gambia, Gibraltar, Gold Coast, Jamaica, Leeward Islands, Federation of Malaya, Nigeria (Federal and Regional Governments and Southern Cameroons), Malta, Mauritius, Northern Rhodesia, Seychelles, Sierra Leone, Singapore, Trinidad, Windward Islands. For territorial elections in Nyasaland, European and Asian electors were registered on a common roll. In Uganda it is hoped to introduce common roll elections in 1961 and in Tanganyika in 1958. The elections in British Guiana will be on a common roll.

*Emergency powers.* An Order in Council amends the provisions of the Order in Council of 1939 relating to the bringing of Part II of that Order into operation in a territory, and also amends the First Schedule which sets out the territories to which the Order applies (Emergency Powers (Amendment) Order in Council, 1956 (S.I. 1956 No. 731)).

*Reports.* The Colonial Development Corporation has published its Report and Statement of Accounts for 1955. For the first time in the eight years of its existence there is a surplus (£409,233) on revenue account (H.C. 260 of 1955–1956). The House of Lords debated the Report on June 20, 1956 (197 H.L. Deb. 1123–1176).

The Colonial Office has published its report on the Colonial Territories 1955–1956. The Report is divided into six chapters: the Colonial Office and H.M.'s Oversea civil service; constitutional and general; economic and financial developments; social services; research and surveys; international relations (Cmd. 9769).

The Overseas Food Corporation has published its Annual Report and Statement of Accounts for 1954–1955 (H.C. 195 of 1955–1956).

*Schemes.* The Return has been published of Schemes made under the Colonial Development and Welfare Acts by the Secretary of State for the Colonies, with the concurrence of the Treasury, in the period from April 1, 1955, to March 31, 1956 (H.C. 309 of 1955–1956).

### Aden

*Status of the Colony.* An Aden delegation outlined demands to the Parliamentary Under-Secretary of State for the Colonies. The delegation included three elected members of the Legislative Council and represented the Aden Association, a political body which claims 4,000 members. The demands include the election of Ministers by the Legislative Council; municipal councils with full power to elect their own leaders; recognition of Arabic as the official language to allow more Arabs to take part in government; increasing the number of native Aden officers and reducing the number of British officers in senior posts (*Manchester Guardian*, May 16, 1956). On May 19, 1956, the Parliamentary Under-Secretary of State addressed the Aden Legislative Council and stated *inter alia*, that there would be no question of any further radical change in the constitution during the life of the present Council; that there was no reason why they could not expect to achieve further constitutional development in due course; that for the foreseeable future it would not be reasonable or sensible, or indeed in the interests of the Colony's inhabitants, for them to aspire to any aim beyond that of a considerable degree of internal self-government; that H.M.'s Government could not foresee the possibility of any fundamental relaxation of their responsibilities for the Colony (553 H.C. Deb. 65–66, June 6, 1956). On June 13, 1956, the House of Lords debated the political situation in Aden (197 H.L. Deb. 919–975). The Secretary of State for the Colonies stated that the Parliamentary Under-Secretary of State had left it for the Governor to have further talks regarding the next constitutional steps with the leaders of the Aden Association and other members of the Legislative Council, who were not yet in complete agreement on the proposals to be made to H.M.'s Government (554 H.C. Deb. 1424, June 20, 1956).

The Secretary of State for the Colonies announced that Sir William Luce was to be Governor and Commander-in-Chief of Aden in succession to Sir Tom Hickinbotham who would soon be retiring from that post (*The Times*, June 8, 1956).

### Australia

*Appointment.* The Secretary of State for Commonwealth Relations has appointed Lord Carrington to be High Commissioner for the United Kingdom in succession to Sir Stephen Holmes (*The Times*, May 23, 1956).

*Parliament.* The committee set up to report on salaries of Members of Parliament has recommended increases in salary from £A1,750 to £A2,350 and in the minimum allowance for expenses from £A400 to £A600. It has recommended that expenses allowances be subject to taxation instead of being tax-free as at present (*The Times*, April 19, 1956).

*Political parties.* The committee of the Liberal and Country parties, which was appointed early in the present session to report on relations between the Cabinet and the rank and file of the Government parties as a result of complaints by Government members that they had not been adequately informed of the Government's legislative and administrative programme, has submitted proposals designed to give Government members the same opportunities of examining Bills before the Government submits them to Parliament as Labour members have when a Labour Government is in office.

The report says that private members cannot be expected, regardless of their own views to support Government measures which have not been explained to them and to which they have been given no opportunity of suggesting amendments. It urges that the rights of private members to introduce Bills be made effective by the restoration of regular private members' days in the course of the parliamentary session and that the practice of cancelling the private members' day to make room for Government business be discontinued except in cases of real emergency.

The report asserts the right of private members to submit amendments to Government Bills subject to the Government parties being informed of the proposed amendments in advance. It also proposes that Government party meetings be held at intervals during the parliamentary recess so that members may be kept in touch with the Government's administrative programme, and that members be given an opportunity to summon senior officials to give them expert information on the business before Parliament (*The Times*, April 11, 1956).

**British Caribbean**

*Federation proposals.* The Report by the Conference on British Caribbean Federation (see above pp. 176–177) has been published. It is divided into nine chapters: introduction; the conference; constitutional matters; financial and economic matters; civil service matters; judicial matters; post-conference machinery; position of non-federating territories; and other issues (Cmd. 9733).

The delegates at the Conference were unable to come to a final decision on the site for the Federal capital. The Secretary of State for the Colonies has appointed a commission of Sir Francis Mudie (chairman), Professor H. Myles Wright and Mr. Alexander E. Cook. The terms of reference require the commissioners " to visit those federating territories whose Governments wish them to be considered for the location of the Federal capital, or desire to express views on the site, to examine the facts concerning possible sites, and, within a period of four months from the appointment of the commission, to make recommendations for the consideration of the Standing Federation Committee on the three most suitable sites for the Federal capital in order of preference " (Commonwealth Survey, C.O.I., June 12, 1956).

See also **Leeward Islands** (p. 286, below), **Trinidad and Tobago** (p. 292, below).

**British Guiana**

*Constitution.* The Secretary of State for the Colonies stated that steps were to be taken to introduce an elected element into the legislature and the executive. There would be a Legislative Council of twelve elected members, four officials and not more than eight nominated members. The Executive Council under the Governor would normally consist of four officials, one nominated and five elected members of the Legislative Council. The Government would settle a date for elections which would probably be some time next year but might have to be even later (551 H.C. Deb. 1777, April 25, 1956; and see 196 H.L. Deb. 1215–1218, April 25, 1956). The Secretary of State also stated that the Governor would appoint to the Executive Council those elected members of the Legislative Council whom he considered could best serve the country (552 H.C. Deb. 390, May 2, 1956).

**British Honduras**

*Report.* The Colonial Report, 1954, for British Honduras has been published by the Colonial Office.

**Canada**

*Appointment.* Sir Saville Garner has been appointed High Commissioner for the United Kingdom in Canada in succession to Lieut.-General Sir Archibald Nye whose term of office will conclude towards the end of the present year.

**Ceylon**

*Elections.* As a result of elections held in Ceylon in April, 1956, the United National Party was defeated and a majority was secured by the Mahanjana Eksath Peramuna, a coalition composed of the Sri Lanka Freedom Party, the Viplavakari Sama Samaja Party, the All-Ceylon Bhasa Peramuna and a group of independents (Commonwealth Survey, C.O.I., April 17, 1956).

**Cyprus**

*Debate.* The House of Commons debated the Cyprus question in Committee of Supply on May 14, 1956 (552 H.C. Deb. 1659–1756).

*Report.* The Colonial Report, 1955, for Cyprus has been published by the Colonial Office.

**Gibraltar**

*Status.* The Secretary of State for the Colonies stated that after studying the memorandum on constitutional reform in Gibraltar submitted to him by Mr. Hassan on behalf of the Association for the Advancement of Civil Rights, he had informed the Governor that the proposals as a whole offer a reasonable basis for the commencement of local discussions; and the Secretary of State had invited him to seek the views of other members of the Legislative Council and of such other individuals and bodies as he thought proper. The Secretary of State had suggested that these discussions should concentrate first on proposals relating to the composition of the Legislative Council and the City Council and he hoped that it would be possible to effect any changes on which there was agreement before the next council elections which were due to take place later this year (552 H.C. Deb. *113*, May 9, 1956).

**Gold Coast**

*Courts.* A suit brought by the appellants, who were children by "six-cloth" marriages of the deceased, in a Native Court B for the determination of their share in the estate of the deceased according to Ga native customary law and for the distribution of the estate was *held* to be a "succession cause" and not a "land cause" relating to the ownership, possession or occupation of land, and, therefore, no appeal lay under r. 46 of the Native Courts (Colony) Ordinance, 1945, from the Native Court B's decision: VANDERPUYE *v.* BOTCHWAY [1956] 2 W.L.R. 1080, P.C.

*Report.* The Colonial Report, 1954, for the Gold Coast has been published by the Colonial Office.

*Status.* On April 19, 1956, the Gold Coast Government issued a White Paper outlining proposals for the independence of the Gold Coast as a member State of the Commonwealth (*The Times*, April 20, 1956). The Round Table Conference (see above, p. 179) accepted the pattern of Sir Frederick Bourne's recommendations and recommended measures to give Chiefs an acknowledged position in the conduct of regional affairs (551 H.C. Deb. *147*, April 25, 1956).

The Secretary of State for the Colonies stated that efforts to bring about a reconciliation between the major parties on the form of constitution which the Gold Coast should have when it achieved independence within the

Commonwealth had so far met with no success. He had told the Prime Minister of the Gold Coast that if a General Election were held H.M.'s Government would be ready to accept a motion calling for independence within the Commonwealth passed by a reasonable majority in a newly elected legislature and then to declare a firm date for that purpose (552 H.C. Deb. 1563–1564, May 11, 1956). On May 15, the Governor of the Gold Coast announced that, after consultation with the Prime Minister of the Gold Coast, he proposed to dissolve the Legislative Assembly after the end of this sitting (552 H.C. Deb. *165*, May 15, 1956). The dates of the General Election were fixed for July 12 and 17, 1956 (553 H.C. Deb. *60*, June 6, 1956).

### Kenya

*Constitution.* The Minister of State for Colonial Affairs stated that H.M.'s Government were pledged not to initiate changes in the Kenya constitution before the election of 1960. He understood, however, that representatives of all races in the Legislative Council were considering proposals for changes in the composition of the Council. These proposals had not so far been submitted to the Governor and H.M.'s Government for consideration (551 H.C. Deb. *144*, April 25, 1956).

*Franchise.* The Minister of State stated that a Bill implementing the Kenya Government's policy in regard to African elections as set out in Sessional Paper No. 39 of 1955–1956 had been passed without amendment. The necessary administrative arrangements for holding African elections before March, 1957, were now being made (551 H.C. Deb. *15–16*, April 11, 1956).

*Local government.* A Government White Paper proposing new local government legislation was tabled in the Legislative Council on June 20, 1956, simultaneously with the report of the Commission which spent three months in Kenya taking evidence about alleged corruption in the affairs of Nairobi city council. The Commission reported that failures and irregularities resulted in "very heavy financial loss to the ratepayers." The Government White Paper accepted the main conclusions of the Commission and agreed that serious defects were disclosed in the city council administration (*The Times*, June 21, 1956).

*Situation.* The House of Commons debated the situation in Kenya in Committee of Supply on June 6, 1956 (553 H.C. Deb. 1089–1215).

### Leeward Islands

*Status.* An Order in Council has appointed July 1, 1956, as the date on which the Presidencies of the Leeward Islands become separate colonies (see above, p. 181) and provides for the continuation in force of certain laws and for their modification and adaptation. The Order also makes provision for the transfer of the assets and liabilities of the Colony of the Leeward Islands, and for certain other matters consequent upon the constitution of the four new colonies (S.I. 1956 No. 833).

### Malaya

*Status.* The Secretary of State for the Colonies stated that Lord Reith had accepted appointment as chairman and Sir William McKell as the Australian Member of the Constitutional Commission (see above, pp. 181–182) (552 H.C. Deb. *174*, May 16, 1956).

See also ONG BAK HIN *v.* GENERAL MEDICAL COUNCIL (p. 281, above).

### Mauritius

*Local government.* The Commission (Chairman: Mr. B. Keith-Lucas) appointed to inquire into the conduct of local elections and to make recommendations has reported. The Commission concluded that the conduct of the elections had not been satisfactory. The main causes were (a) the fact that the existing law did not provide suitable machinery for the compiling of an accurate register and (b) the failure to make adequate administrative arrangements for checking the register. The proposals designed to remedy these defects included the appointment of an independent Electoral Commissioner to be responsible for all registration and the conduct of all elections (Commonwealth Survey. C.O.I., April 13, 1956).

*Report.* The Colonial Report, 1954, for Mauritius has been published by the Colonial Office.

**Nigeria**

*Constitution.* A Constitutional Conference is to be held in London in September, 1956.

An Order in Council makes certain amendments to the provisions of the Nigeria (Constitution) Order in Council, 1954, relating to the composition of the Western House of Assembly, the introduction of Bills by message of the Governors of the Western and Eastern Regions of Nigeria, voting in the Western House of Assembly, the judiciary, the public service and the Legislative Lists (S.I. 1956 No. 836 amending S.I. 1954 No. 1146).

*Elections* to the House of Assembly, the lower chamber of the legislature in the Western Region, took place on May 26, 1956. Out of a total of 80 seats, 48 were won by the Action Group and 32 by the National Council of Nigeria and the Cameroons. In the previous legislature the Action Group held 60 seats and N.C.N.C. 13 (Commonwealth Survey, C.O.I., June 12, 1956).

*Emergency Powers.* In 1954 the office of Governor of Nigeria was abolished and replaced by the office of Governor-General of the Federation. An Order in Council has been made providing for the interpretation of the Emergency Powers Orders in Council, 1939 and 1952, to make clear that the powers formerly exercisable by the Governor are now exercisable by the Governor-General (S.I. 1956 No. 616 amending S.I. 1952 No. 2031).

*Oversea Civil Service.* See above, p. 253.

**Nyasaland**

*Appointment.* Mr. Thomas Crowe Spenser-Wilkinson has been appointed Chief Justice in succession to Mr. R. O. Sinclair.

*Governor's powers.* An Order in Council has been made amending the provisions of the Nyasaland Order in Council, 1907, relating to the Governor's power to make and execute grants of land, and makes a consequential amendment to the Nyasaland Order in Council, 1956 (S.I. 1956 No. 834 amending S.R. & O. 1907 No. 541 and S.I. 1956 No. 231 (see above, p. 184) ).

**St. Helena**

*Government.* The Minister of State for Colonial Affairs stated that the main constitutional changes made in the Order in Council of 1956 were the addition of three unofficial members to the Executive Council, which previously contained only officials, and the enlargement of the Advisory Council from a maximum of six to a maximum of ten members (see above, p. 185) (551 H.C. Deb. *149,* April 25, 1956).

**Sarawak**

*Report.* The Colonial Report, 1954, for Sarawak has been published by the Colonial Office.

**Singapore**

*Constitution.* A White Paper on the recent Singapore Constitutional Conference has been published. The following information is taken from the White Paper.

The delegation which came from Singapore represented all the parties in the Legislative Assembly and was headed by the Chief Minister. It consisted of 13 members: on the Government side there were 5 members of the Labour Front and 2 of the Alliance; 4 Liberal Socialists and 2 members of the People's Action Party represented the opposition parties.

The United Kingdom Government approached the Conference with the following objects of policy before them:

(a) to carry forward the devolution upon the people of Singapore of the direction of their own affairs in accordance with the central purpose of British Colonial policy, endorsed by all parties in the United Kingdom;
(b) to ensure the maintenance of the democratic way of life in Singapore, and its defence against external or internal attack;
(c) to maintain the position of Singapore as a great commercial and trading centre in South-East Asia, since upon that position depends the livelihood of its people;
(d) to maintain the position of Singapore as a major strategic centre and base in the defence system of the free world.

The Conference opened in London on April 23, 1956. At its first private session it had before it proposals, submitted by the Singapore delegation, which called for a Singapore Independence Act to confer upon the territory sovereign independence by April 1, 1957. Provision was made to vest in the United Kingdom Government, for the time being, responsibility for the external defence of Singapore, and for the establishment of a Defence Council, on which the United Kingdom Government and the Singapore Government would be equally represented, under the chairmanship of the United Kingdom representative. These proposals were, however, so drawn that the representatives of either Government on the Defence Council would, in practice, have a veto on its decisions, since any proposal was to be lost if there was parity of voting, and the chairman was not to have a casting vote.

The United Kingdom Government found it impossible to accept the proposal that Singapore should become a sovereign independent State by April, 1957. They could not take the irrevocable step of abrogating, for all time, all rights and powers in Singapore at a moment in history when there had been no appreciable period of stable democratic government in the Colony, when no political party held a commanding majority, when it was impossible to foresee what the future might bring in internal political development, and when strong subversive forces were known to be at work; and all this in an island State of the greatest strategic importance in the defence of the free world.

This was explained to the Conference in a statement by the Secretary of State, in which he also set out the United Kingdom Government's offer of a constitution conferring upon Singapore a new title and an alteration in the style of the Queen's representative as an indication of the advanced status of the territory, together with internal self-government and an important share in the conduct of external affairs; it also proposed that, in present circumstances, the United Kingdom Government should, as a safeguard, retain an ultimate reserve of authority in matters of external defence, external affairs and internal security, on the definite understanding that such authority would be exercised only in case of clear necessity, after consideration in the local Defence and Security Council and, if necessary, after reference to the Secretary of State for the colonies. The Defence and Security Council should have equal numbers of representatives of the United Kingdom and Singapore, but the chairman, who should be the High Commissioner, should have a casting vote.

The United Kingdom Government's proposals were discussed on April 25. At a meeting on May 1, the Singapore delegation tabled a memorandum commenting on these proposals, and putting forward, as a counter-proposal, a draft Independence Bill.

While the delegation adhered to their demand for independence, to be conferred upon them by an Act of the United Kingdom Parliament, and had, indeed, incorporated in their draft Bill the provisions of the Statute of Westminster normally associated with the attainment of complete independence, they had modified certain of their original proposals to take account of the views of the United Kingdom Government. In particular, they provided that external affairs, as well as external defence, should be the responsibility of the United Kingdom Government, and that the proposed Defence and Security Council should be established for a transitional period not exceeding six years with consultative and advisory functions only; they also provided that, during the six-year period, Her Majesty‘s Government in the United Kingdom could, if the defence installations were threatened by a deterioration in the internal security situation, or if the Government of Singapore had acted in contravention of the constitution, temporarily suspend the constitution of Singapore and themselves assume full responsibility for governing the island. But, apart from this, the new proposals contained no provision for the exercise of any powers in Singapore by the United Kingdom Government, despite their responsibility for external affairs and external defence, short of the right to take over the whole government of the territory.

It has been the hope of the United Kingdom Government that there would be a joint recognition of a joint interest in the prevention of Communist subversion in Singapore, not only in the interests of the defence installations, but also in the interests of the peoples of Singapore and of neighbouring territories whose freedom and livelihood would be threatened. The leader of the Singapore delegation, while acknowledging the interest of the United Kingdom Government, would not agree that that interest formed the basis for any joint responsibility, but claimed that it should confer no more rights upon the United Kingdom Government than flowed from that Government’s interest in the defeat of Communism in, say, Australia or India. He conceived that the United Kingdom Government’s position in Singapore in relation to bases should be analogous to their previous position in the Canal Zone of Egypt. It was, therefore, insisted that the United Kingdom Government should retain no power to act in Singapore short of the power totally to suspend the constitution. This was a position the United Kingdom Government could not accept, since, with the extreme step of suspending the constitution as their only means of action, there was the danger on the one hand that it might have to be invoked in circumstances which of themselves would not fully justify so serious a measure; and, on the other, that the United Kingdom Government would hestitate to invoke such a power until it was too late and still more drastic action became necessary to retrieve the situation.

The United Kingdom Government, therefore, considered it essential that they should retain some less drastic power which could be used in an emergency in the island. Under the present constitution there are reserved legislative and executive powers vested in the Governor, and an unfettered right to make Orders in Council for the island. The United Kingdom Government proposed that these powers should be replaced in a new constitution by a limited right to legislate by Order in Council, which would be exercised only if it was essential to give effect to the United Kingdom Government’s obligations and responsibilities in the specific fields of external defence and external affairs.

It had already become clear that the question of retention of any power by the United Kingdom Government, other than the right to suspend the constitution, was the crucial issue before the Conference. While the Chief Minister made it clear that the retention of any such power was completely unacceptable to him personally, he asked that, since the proposal might not be so completely unacceptable to members of his delegation, the United Kingdom Government should define the powers they wish to retain.

In order to avoid any misunderstanding or ambiguity, the United Kingdom delegation then prepared a draft of the actual provision, in the legal terminology which it would require, which might be incorporated in an Order in Council containing the constitution. In presenting this to the Conference, the Secretary of State invited the Singapore delegation to suggest ways in which the provision might be recast or qualified to make it more acceptable to them, and in circulating a further paper summarizing the United Kingdom proposals as they then stood, the United Kingdom delegation themselves suggested certain riders which might be attached to this clause to limit what might be done under it. The effect of the proposal was that the legislative powers to be retained by the United Kingdom Government could be exercised only after a report by the Defence and Security Council, and only then in relation to the United Kingdom Government's responsibilities for external defence or external affairs. The Secretary of State undertook to consider entering into any undertaking which the delegation might think helpful to the effect that the powers would not be used unreasonably. They represented a reserve and a safeguard, and it was in no way the intention of the United Kingdom Government to interfere in the day-to-day administration of the territory.

Discussion of the United Kingdom Government's proposals, and in particular of the powers it sought to retain, was resumed on May 12, when the Chief Minister circulated a memorandum and some further counter-proposals on behalf of the majority of the Singapore delegation.

The Chief Minister, in his proposals, suggested that the legislative powers by Order in Council, which the United Kingdom Government desired to retain, might be acceptable if it was agreed that they could be exercised only after a recommendation of the Defence and Security Council (which the United Kingdom Government had themselves proposed) and provided that the chairman of this Council was not the High Commissioner, as the United Kingdom Government had proposed, but a Malayan, to be appointed by the Government of the Federation of Malaya. This suggestion, at one stroke, removed the exercise of these powers from the discretion of the United Kingdom Government, since the chairman was to have a casting vote in the Council, and, on contentious issues, the United Kingdom Government representatives could find themselves liable always to be in a minority. The United Kingdom Government considered that responsibility for the exercise of their own powers could not be transferred in this way to other shoulders, and that the Chairman of the Council would have to be the High Commissioner if the proposals were to be acceptable to the United Kingdom Government.

At the final meeting of the Conference on May 15, the Chief Minister stated that this was unacceptable to the delegation and it was reluctantly agreed that no further useful purpose could be served by continuing the discussions of the Conference.

Two days after breakdown of the Conference, the Chief Minister of Singapore suggested to the Secretary of State for the Colonies that it might still be possible to reach agreement on a further proposal concerning the exercise by the United Kingdom Government of the legislative powers which they sought to retain. He confirmed this in a letter, in which he suggested:

(a) that the overriding powers of legislation by Order in Council and Emergency Regulations should be subject to affirmative resolution of the House of Commons (such approval to be prior or subsequent as the circumstances required);

(b) in order to meet the very real need of the people of Singapore for an end of colonial rule, the relationship of the State of Singapore with the United Kingdom should be outside the scope of the Colonial Office and in any Ministry which might seen appropriate;

(c) that there should be a representative of Her Majesty in Singapore as the head of the State in Singapore. Her Majesty's representative should be a Malayan and completely distinct from the political representative of the United Kingdom Government in Singapore.

The Secretary of State replied that the first proposal appeared to him to present a hopeful line of approach. He indicated that he was prepared to discuss the matter if the proposal was endorsed by the Singapore delegation, and if there was agreement that it would be possible to reach a settlement on the general basis of the proposals finally put forward by the United Kingdom Government as thus modified. He said, however, that he was not willing to risk the consequences which might follow from a second breakdown of the Conference and that the possibility of reaching agreement must be established before the Conference could be reconvened. He therefore invited all the Singapore delegation to meet him informally. Only the Chief Minister, accompanied by two of his colleagues, came to this meeting. The Chief Minister made clear that these latest proposals were made on his own responsibility and asked the Secretary of State for his views on them. The Secretary of State said that he would be very willing to discuss the first proposal if it were put forward either by the Singapore delegation as a whole, or by the Singapore Government. As to the other two suggestions, he said that he did not think it was appropriate that responsibility for Singapore should be transferred to the Commonwealth Relations Office at the present stage of Singapore's constitutional development, during which certain vital matters remained the responsibility of the United Kingdom Government. He indicated that similar considerations applied to the appointment of a representative of Her Majesty (irrespective of who he might be) in addition to, and separate from, the representative of Her Majesty's Government in the United Kingdom. So long as important responsibilities were still reserved to the United Kingdom Government, it would be inappropriate that the High Commissioner, on whom these responsibilities would devolve, should be other than the Queen's representative.

It had by now become clear that, with the breakdown of the Conference, the divergent views of the parties represented on the delegation, and the local political considerations which at once came into play, had ended the possibility of any unanimity on the part of the delegation or, indeed, as it appeared, on the part of the Singapore Government representatives, since the Alliance members of the Government coalition had not accepted the invitation to discuss these suggestions. It was thus not possible to reopen the proceedings of the Conference at the present time.

Mr. Marshall resigned from the office of Chief Minister of Singapore on June 7. In his letter of resignation, he recalled that, on becoming Chief Minister, he had promised to achieve political freedom constitutionally and peacefully within the framework of close and friendly relations and co-operation with Britain and the Commonwealth, and had said that, if he failed, he would resign.

A new Government, under Mr. Lim Yew Hock, formerly Minister of Labour and Welfare, was sworn in on the following day. Except for Mr. Marshall, its composition is the same as that of the previous Government.

The above summary of the White Paper: Singapore Constitutional Conference (Cmd. 9777), is taken from Commonwealth Survey, C.O.I., June 12, 1956. For statement by the Secretary of State for the Colonies on the ending of the Conference, followed by questions and answers, see 552 H.C. Deb. 2017–2025, May 16, 1956; and 197 H.L. Deb. 471–474, May 16, 1956; also 552 H.C. Deb. 2381–2384, May 18, 1956, when the Secretary of State said that H.M.'s Government were willing to renew discussions with the present or any other Government of Singapore on the basis of the proposals put before the Singapore delegation at the recent Conference.

### Somaliland

*Constitution.* The Parliamentary Under-Secretary of State, during his visit to British Somaliland, broadcast a statement, with the approval of H.M.'s Government. This statement, after indicating the economic and educational plans of H.M.'s Government, continued "The primary object of all these developments is to make the Somalis of the Protectorate ready for internal self-government. H.M.'s Government is not, however, laying down a definite timetable for political advances . . . H.M.'s Government will, however, review the position in consultation with the people of the Protectorate within a reasonable time after 1960 . . . A Legislative Council with certain powers over legislation and finance will be introduced within the coming twelve months, and local government councils will be progressively established throughout the Protectorate" (553 H.C. Deb. *61–62,* June 6, 1956). The Secretary of State for the Colonies said subsequently that the Legislative Council would be composed of the Governor (as Resident), three ex-officio Members (the Chief Secretary, the Attorney-General and the Financial Secretary), not more than five Official Members and not more than six Unofficial Members (554 H.C. Deb. *28,* June 13, 1956).

### South Africa

*Appointment.* Dr. J. E. Holloway, South African Ambassador in Washington, has been appointed High Commissioner in London (*The Times,* May 30, 1956).

*Constitution.* The Cape Provincial Division of the Supreme Court, in a unanimous judgment, delivered on May 18, 1956, upheld the legality of the Senate Act, 1955, and rejected the application by two Coloured voters to restrain the Minister of the Interior and the Cape Town electoral officer from removing their names from the common voters' roll. An appeal is now pending to the appellate division of the Supreme Court (*The Times,* May 19 and June 15, 1956).

*Racial policy.* A debate took place in the Parliament of South Africa in May, 1956, on the report of the Tomlinson Commission. This Commission declared that white-black relations could be determined in a satisfactory manner only on a basis of full territorial *apartheid.* A leading article in *The Times* of May 17, 1956, stated that the debate showed that the Nationalist Party was determined to press on with its declared policy of *apartheid.*

### Trinidad and Tobago

*Constitution.* An Order in Council has been made establishing a reformed Executive Council and Legislative Council for the Colony. The Executive Council now consists of the Governor, as Chairman, and ten other Members, eight being elected by the Elected Members of the Legislative Council from among their own number. Of these one is elected Chief Minister. Provision is made for charging Members of the Executive Council with responsibility for departments or subjects. In the Legislative Council the number of Elected Members is increased from eighteen to twenty-four. Provision is made for an elected Speaker. The Order also establishes a Police Service Commission and Police Promotions Boards to be constituted in accordance with regulations made by the Governor (S.I. 1956 No. 835 amending S.I. 1950 No. 510).

*Elections.* A proclamation by the Governor dissolving the Legislative Council was published on May 26, 1956. A general election has been fixed for September 24, 1956 (*The Times,* May 28, 1956).

### Uganda

*Elections.* The Governor of Uganda stated on April 24, 1956, that direct elections on a common roll would be introduced for the representative members of the Uganda Legislative Council in 1961 provided that there was a general desire for this throughout the country and that arrangements could be recommended which were acceptable to the U. K. Government. Referring to the review of the method of electing the five Buganda representative members of the Uganda Legislative Council, which, under the terms of the Buganda Agreement was to take place in 1957, the Governor said that if there was a general desire for direct elections of these members at the end of 1957, such elections would provide an excellent opportunity of testing the method of direct election in preparation for the general examination throughout the country between 1958 and 1961 (Commonwealth Survey, C.O.I. May 1, 1956; and see 552 H.C. Deb. 395–396, May 2, 1956).

*Report.* The Colonial Report, 1955, for Uganda has been published by the Colonial Office.

### Zanzibar

*Elections.* The Zanzibar Government has accepted the recommendation of Mr. W. F. Coutts (see above p. 187) that common roll elections be introduced for six of the 12 unofficial seats in the Protectorate's Legislative Council but has modified several other recommendations in his report, one of them being that franchise should be restricted to subjects of the Sultan. Mr. Coutts had recommended that franchise should be open to British subjects or British protected persons.

Mr. Coutts also had recommended that of the twelve unofficial members of the Legislative Council six should be elected and six allocated to various racial communities. The Zanzibar Government proposes that after a general election any person qualified as a canditdate for election should be entitled to offer himself as a candidate for one of the remaining seats, provided he can obtain support from not fewer than 100 registered electors, none of whom is similarly supporting another candidate. A person would not be debarred by defeat in a general election from offering himself for one of these seats. The final choice would rest with the Sultan who would be advised by the British Resident (*The Times,* June 18, 1956).

# BOOK REVIEWS

THE UNITED KINGDOM—SCOTLAND AND THE CHANNEL ISLANDS. THE BRITISH COMMONWEALTH, Vol. I, Part II, by Professor T. B. SMITH and L. A. SHERIDAN. [London: Stevens & Sons Ltd. 1955. xi and 550 and 17 (appendices) and 43 (tables and index). £3 3s. net.]

PROFESSOR T. B. SMITH has produced a notable book. For substantially this volume, despite its apparent joint authorship, is Smith and not Sheridan; of its 550 pages something less than twenty are devoted to the Channel Islands. It can then be regarded as a book on the law of Scotland with an appendix, though the appendix here is certainly valuable.

Even if the major part is alone regarded for the moment, the book is one of the most valuable in this series. Hitherto the novice in Scots law has been badly served when compared with his English counterpart. Although there have been introductory books, the good ones have been too brief for the serious student. On the other hand, major textbooks too often lacked both the attractiveness and the youth of the English ones. Some, of course, might regard this situation as happy, since it might make the student start with the Institutional writers, yet the latter are not to every beginner's taste, and many cannot profit from them. Now the student is robbed of excuses. He is faced by a book which is broad in scope, elegant in style, and stimulating in presentation. The start is made easy and the rest is up to him. Moreover, because of the single authorship this volume stands out in its series; it has a unity which its companions often lack. Under the five headings of Background and Sources, Public Law, Family Law, the Law of Property, and Obligations, the great bulk of the law is dealt with not merely by exposition, but by argument and criticism as well. Indeed it is surprising when allowance is made for the length of the argumentative passages how much ground has been covered.

It would, though, be a mistake to class this book as merely an excellent introductory one for students of Scots law. Professor Smith has the great advantage that he is legally bi-lingual. Hence Scots law is discussed in relation to English law, and the essential differences between the two appear all the more sharply because the author is at home in both. It is perhaps arguable, though the present writer should not press the point, that this double background is particularly useful in law-teaching in Scotland at the present time. A training in one system makes one constantly ask, on translation to a different jurisdiction, " But is this rule really applicable *here*? " [1] A thorough knowledge of one system makes it easier to see what are the proper or permissible limits of borrowing (past or present) from it, to realise where superficial resemblances are concealing fundamental differences, and where one system is being unnaturally twisted under the influence of the other. It is because Professor Smith is prepared to question and contrast that his book has so much interest for the general reader. Possibly the novice may find some passages heavy going, the argument around the *Polemis* rule is an example, but certainly the book would be much poorer without them. It is because the book argues (and, as a contributory cause, because the author has no false modesty about the system he professes) that it makes such pleasant reading.

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[1] Conversely, of course, an initial training in Scots law with its emphasis on principle would be a desirable background to the teaching and study of English common law. The shock which Lord Dunedin felt is a good beginning for a critical approach.

Of course any reader may find fault. This one would have liked more of procedure and of the system of pleading, which is perhaps more important in Scotland in determining the weight of decisions than it is in England. One would have liked more of "mortgages," without which modern land law is incomplete, and on which the law of Scotland is probably not as satisfactory as that of England. Certainly one would have liked a glossary. Not only would this have avoided the disruptive effect on thought of current translation, *e.g.*, personal bar (*anglice* estoppel), which sets one wondering whether the two are identical, but also it would help some readers through what may prove to the uninitiated to be difficult sentences. Even the simple phrase "the Glasgow Dean of Guild authorised the Fiscal" may well mean as little to the stranger as a sentence of broad Clydeside. Nor will the reader always agree with what is there. It is probable that the difficulties of making the Register of Sasines nearer in achievement to the Land Registrar are exaggerated, in part at least because of an unhappy mixing of land and estates in land. But certainly on the private law side neither this journal, nor this reviewer, is apt to argue in detail. It is enough, as with a first-rate novel, to commend the style and plot and to urge the reader to find his pleasure by pursuing his proper function.

More can perhaps be said on the public law side, since here Professor Smith raises more general issues. In any event he trails his coat so often that it would almost be ungenerous to leave all challenges unanswered. In one chapter he discusses "The Constitutional Significance of the Union" and inevitably is there concerned with the sovereignty of Parliament. He concludes that Parliament does not enjoy unlimited sovereignty, but seems to suggest, if not to affirm, that, at least in matters of public right, the courts are not competent to pass upon the validity of statutes. Perhaps here Professor Smith chooses the wrong arguments to prove his case. Logical arguments based on the delegation of power by one Parliament to another, and arguments based upon the legal position of the King (even if they are logical), are here as weak as purely logical arguments are, in England, to prove the legality of the settlement of 1688. What is necessary is to accept that "revolutions" do occur behind a façade of legality, and to accept the "revolution" as providing a fresh starting point. 1688 is one such; 1707 is another. It is, moreover, by emphasising the character of the Treaty or Act of Union as a constituent document, which by its terms it purports to be, that a thesis maintaining its binding quality becomes more easily tenable.

So far as the ability of a Parliament to exclude itself after its creation from any legislative field is concerned, the arguments of convenience which Professor Smith has himself used,[2] in urging that decisions of ultimate courts should not bind for all time, apply as strongly in the legislative field. "The word 'never'," as Sir Winston Churchill has pointed out, "is one which in politics can only be used in its general relativity to the subject."[3] Moreover, arguments based on the sovereignty or non-sovereignty of the English or Scots Parliament at 1707 are at best inconclusive. It cannot, it seems, be clearly established that the English Parliament was in law incapable of binding itself.[4] On the other hand it cannot be established that the Scots Parliament was capable of doing so. The phrase "in all time coming" or the like did not first appear in the Act of Union, and earlier statutes which contained it were repealed.[5] Indeed, Stair bluntly asserts: "Whatever a Parliament can do at one time in making of laws or determining of causes, may be at their pleasure abrogate or derogate."[6]

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[2] *Judicial Precedents in Scots Law*, at pp. 32 *et seq.*

[3] H.C.D., Vol. 531, col. 1033.

[4] Certainly there was no clear uniform doctrine expressed in the debates on the proposed repeal of the Act of Union.

[5] The phrase is almost a commonplace in statutes, particularly those dealing with the Church and the Crown, and it in no way impeded their repeal. It is, of course, true that the declarations of eternity are stronger in the Treaty of Union, nevertheless many of these other examples were probably intended to be perpetual regulations.

Further, Professor Smith's arguments in connection with the position of the Parliament of Scotland are not all on the same plane, and yet are not clearly distinguished. The Parliament of Scotland did, of course, share power with the General Assembly and the Convention of Royal Burghs, but the rivalry of these bodies was largely in the realm of fact. It can explain the political weakness of the Parliament; it does not govern the legal theory about the sovereignty of Parliament in Dicey's sense. The proposition that the terms of the Act of Union are binding cannot, with respect, be demonstrated, even with the very weighty support of Lord Cooper, by maintaining that the general doctrine that Parliament cannot bind itself is a purely English doctrine without any Scottish counterpart and thus out of place in the constitutional theory of the United Kingdom. It is possible that the doctrine is part of a common heritage or even a post-union development. Because of the antiquity of the constitution of Parliament there is at times a tendency to overlook the novelty of some of its attributes. The proposition can be supported on the basis that the Act of Union is a constitutional act, which created and limited a Parliament. On that basis the attributes of either of the pre-existing Parliaments or the development of theories as to the power of the post-union Parliament are both irrelevant.

Yet even if, albeit by a different route, it is possible to reach the same conclusion as the author on the first part of his thesis, one can still dispute the second. Paradoxically the different treatment of public right and private right in the Act of Union, while on its face it appears to afford more possibility of judicial review in the latter case, yet in fact, because of the wording of the Act, it is in that case that judicial review is most strongly excluded. Against the background of the general theory of the modern State, the judges of what is for the "evident utility of the subjects" must surely be found in Parliament, and not in the courts. The resemblance with matters which the U.S. Supreme Court would hold to be "political questions" is marked. On the other hand, difficulties in regard to public right are largely procedural, and related to the question of title to sue. As such they are more easily removable or capable of being overcome. Here perhaps Professor Smith is too modest in the deductions he draws because he makes too general what Lord Cooper in *MacCormick's* case made specific. Some parts of Lord Cooper's opinion appear to have been made intentionally narrow. Thus he concluded: "I am constrained to hold that the action as laid is incompetent in respect that it has not been shown that the Court of Session has authority to entertain the issue sought to be raised" and earlier rejected jurisdiction "to determine whether a governmental act of the type here in controversy is or is not conform to the provisions of a treaty."[7] Such sentences do not it seems amount to an outright rejection of judicial review.

In one other part of the same section it may be thought that there is under-emphasis. It is possible that there are greater differences in general administrative law than is here suggested. Here it is enough to say that signs of that exist in both *Glasgow Corporation* v. *Central Land Board*[8] (where Professor Smith proved to be an admirable prophet) and in *Hayman* v. *Lord Advocate*.[9] At some stage it is hoped to show that these and others like them are not solitary swallows but part of a flight, and hence have added probative force. Perhaps too much space has been taken with argument. The excuse can only be that this is too good a book to permit a merely passive review. Rumour has it that what was originally intended was a chapter. It is indeed fortunate that that intention was frustrated.

[6] Bk. I, Tit. IV, 61. See also Erskine 1. 1. 19.
[7] 1953 S.C. at p. 413.
[8] 1956 S.L.T. 41.
[9] 1951 S.C. 621.

Of Dr. Sheridan's part it can be said that within its limits it equals its larger neighbour. It is only concerned with the structure of government and relationship to the United Kingdom. But these matters are clearly and well dealt with, and the reader having been shaken by realising his ignorance is provided with the material for still further reducing it. Though overshadowed in length, this part remains a good contribution to a worthwhile volume.

J. D. B. MITCHELL.

FUNDAMENTAL RIGHTS IN INDIA. By A. GLEDHILL. [Stevens. 1955. pp. 129. 25s.]

THE inclusion of a set of Fundamental Rights in the Indian Constitution has been much debated. On the one side, there are those who see little value in this device, believing that it affords no additional protection to the individual, erects barriers which determined governments will certainly circumvent, brings about unnecessary and useless conflict between legislature and judiciary and fills the pockets of the lawyers. There are others who see in a body of rights formally set out in a constitution the best and perhaps (when, for instance, there is a weak opposition) the only way of preventing majority tyranny and the consequent suppression of liberty and justice. The argument took place during the framing of the Constitution and the final document indeed shows the marks of compromise. As Professor Gledhill points out, some rights—but these in fact are few—are boldly asserted without qualification; others, while similar in form, evidently contemplate qualification in their interpretation; others again—and here are included the important rights to freedom of expression, assembly, association, movement, residence, occupation and the holding of property—have their exceptions explicitly stated.

But the argument did not simply precede the introduction of the Constitution; it has continued subsequently. That is to say, there has been some disagreement as to the way in which the Fundamental Rights provisions have in practice operated since 1950. For all save the closest students of Indian court decisions, the argument has relied for evidence on a mere half-dozen cases—usually those which have been followed by government action—and has therefore leaned heavily on prejudice. Professor Gledhill's book, even if it cannot finally settle the argument, at least furnishes in compact form a most useful body of material which will make inexcusable the wilder partisan expressions of opinion which have hitherto held the field.

The author, after a Part One which discusses the writs by which the rights are enforced, takes the rights in turn and examines the more important decisions in regard to each; as he says, there is already a large body of case law on most of the rights. There is not here the space to indicate any of detailed findings, but it may be said that in the discussion of almost every right the reader will find some light thrown on both the nature of Indian political and social life and on the process of judicial interpretation as such.

Professor Gledhill's general conclusions are of special interest since he does not share the attitude of scorn usually manifested by English lawyers when confronted with Fundamental Rights. He concedes that " by and large, the protection of a Fundamental Right is a privilege of the comparatively well-to-do," even though the costs are in most cases borne by the Government. More important are his strictures on the operation of preventive detention: " the constitution gives the short-term detenu no judicial protection from a hasty or ill-considered order of an executive official," and the courts have followed the majority decision in *Liversidge's* case even though there is no pretence that the Preventive Detention Act is emergency legislation. Most important of all are his comments on the addition to the Constitution of Articles 31a and 31b by the First Amendment Act, 1951. Against Pandit Nehru's 1949 warning that " no law, no judge is going to come in our way," Professor Gledhill insists—

as perhaps a former judge of the High Court at Rangoon was bound to do—that "the Constitution, not the legislatures, should be supreme. The purpose of having Fundamental Rights is to prevent a temporary majority in a legislature abusing its powers." (But is the whole truth quite as simple as this? On Professor Gledhill's own showing, their other, and in practice more important, function is to control executive arbitrariness. Generally, after all, a legislature's abuse of its powers is an event "at the margin" of political life, not its day-to-day reality; the contrary is more likely to be true of the executive, and the legislature cannot be always a complete check. In other words, the worst legislature will not abuse all its powers all the time; the best legislature will not be able to stop the executive from abusing some of its powers some of the time.) Mr. Gledhill goes on: "To sweep aside Fundamental Rights to facilitate the enactment of measures of social reform when the ink was hardly dry on the new Constitution was to create an unfortunate precedent, especially when the comparative ease with which the Constitution can be amended is considered." The force in this criticism can be countered only by the consideration that in the particular matter in question—retrospective validation of legislation for the abolition of zamindari estates—public respect for the Constitution may well have been increased rather than diminished by the amendment. Nevertheless, one cannot easily dissent from the view given in Mr. Gledhill's final paragraph: "It is to be hoped that the Fundamental Rights are something more than a gesture of self-respect on emergence from colonial rule. It may, no doubt, be necessary to give effect to second thoughts regarding them, but this process should not go on indefinitely. They should be widely known and accepted as a code of public conduct."

Yet when all the criticisms have been made, Professor Gledhill is convinced that Indian Fundamental Rights are "dynamic realities." They "have been more than an interesting experiment. In many cases, excess and abuse of administrative power have been prevented." And even if they have not "dramatically enhanced the Indian citizen's freedom of activity, they have not been a serious handicap to administration and . . . less of a handicap to the legislatures than English prophets anticipated. The courts have endeavoured to interpret them so as to avoid the two extremes of giving them no legal effect and of making them an insuperable barrier to legislation and efficient administration."

Since this book deals with "a new and rapidly developing jurisdiction," it is to be hoped that further editions are contemplated. In that case, it may be worth making three suggestions, mainly regarding arrangement. First, there seems no particular value in departing from the sequence of the Articles of the Constitution in such a way as to place consideration of enforcement procedures before the discussion of the rights themselves. On the other hand, in one instance it would add to clarity if the order of the Articles in the Constitution were abandoned: the freedom to hold property and the question of compensation for expropriation deserve to be treated together. Finally, a new edition could with advantage and in very little extra space print the text of the relevant Articles and the Clauses of the Amending Acts.

Professor Gledhill has, no doubt, received the thanks of his LL.M. students and of India specialists. However, his lucid treatment of a complex theme should have a far wider appeal—to all concerned with the study of comparative law and practice, especially within the Commonwealth.

W. H. MORRIS-JONES.

THE ROAD TO JUSTICE. By SIR ALFRED DENNING. [London: Stevens & Sons. 1955. viii and 118 pp. 10s. 6d.]

IN the last two years Sir Alfred Denning has visited South Africa, Canada and the United States of America, and the addresses that he gave have been collected together to form this book. He explains in the Preface that he has "sought to indicate the principles which must be observed in any country if justice is to be done therein," and that it is to those who are about to enter the profession that he would address these lectures.

The book is divided into four parts, of which the first three are about judges and the principles they must observe, lawyers, and the Press. The fourth is about some matters where the law produces, or may produce, unjust results. I have divided the contents in that way because I think that we ought to make a clear distinction between the judicial process and the contents of the substantive law. Sir Alfred Denning does not make that distinction at all clearly, and at times he appears to deny it altogether, but it is only on the basis of that distinction that his book can be appraised.

Taking first the part about the administration of justice, the thing that must strike any well informed reader is its orthodoxy: here, one must feel, is an English judge who says everything, platitudes and all, that one expects him to say. He says it extraordinarily well and as nearly all of it is good sound stuff, that needs saying over and over again, we can read with pleasure what he has written under the headings that the judges must be independent, no man a judge in his own cause, a judge must hear each side, a judge must act only on evidence, a judge should give reasons and a judge should be beyond reproach. A good sermon is no worse for having been preached before, and an attentive congregation would be disappointed if there was no castigation of the devil; actually there is less comment on ministerial powers than one would expect. In the following parts we learn about lawyers, that they are very much better than the public often think, and about the virtues that they should have. We see how we have avoided trial by newspaper and how the Press is kept properly in order. "Lawyers" appear to be virtually limited to members of the Bar. "Every counsel for an accused man must spare no effort to defend him, no matter how much public opinion is against the man, no matter how distasteful is the task, no matter how inconvenient to himself, and no matter how small a fee . . . A good instance occurred during the war of 1939–1945 when spies, or 'fifth columnists' as they were called, were particularly odious to the people at large. Nevertheless, no member of the Bar refused to appear for them" (pp. 53 & 54). I wonder if Sir Alfred Denning appreciates that a solicitor is far more associated with his clients than is a barrister. I knew the solicitor who acted for some of those defendants (he was the principal with whom I served my articles) and I knew the courage that he needed and the stout heart that he had, not just for a fleeting time as in the holding of a brief but in many matters and over many months.

Concerning the Press, can one really believe that newspapers do not quite often present a travesty of the proceedings, at least of inferior courts? The superior judges may be able to protect themselves, but there is very little protection for magistrates. Can anyone who remembers the trial of Rouse, with the enormous publicity given to the committal proceedings, and the evidence given at those proceedings that was subsequently held to be inadmissible, take too seriously the author's statement (p. 67) that "it is unlikely that any juror who has read a newspaper report of the preliminary proceedings will remember sufficient to be influenced by it? Furthermore if the evidence is of doubtful admissibility, it is not reported." The view that Sir Alfred Denning gives us is like the description of some part of the world that we may be tempted to visit: the sun always shines, the prospect is fair and we need have no worries. Did not Blackstone take a somewhat similar view?

When we look at Sir Alfred Denning's attitude towards the law itself we get something very different: there is no complacency and a marked departure from orthodoxy.

> "I have often heard judges say: 'We are only concerned with what the law is, not with what it ought to be': or 'If this leads to an unjust

> result, it is a matter for Parliament, not for us.' They wash their hands of it, as if it was not their concern. It is my purpose here to challenge this facile assumption. It is the lawyers who have made the law what it is. Most of our law, as they will tell you, is judge-made law. The rest of it is Statute law, but that is drafted by lawyers and interpreted by lawyers, and, as often as not, it is in the lawyers' part of it that the injustices occur. They cannot therefore escape their responsibility. The legal profession, by its exponents in days past or in days present, must account for every injustice done in the name of the law. Yet they do not let it trouble them overmuch. The judge says with calm detachment that he is reluctant to come to his conclusion but no other course is open to him. And that is the end of it. His conscience is satisfied because he is acting according to law " (pp. 1 & 2).

The last part of the book is concerned with a number of matters where the law has developed in an unsatisfactory way, such as the use of standard forms of contract which impose unfair and unreasonable conditions upon people who have to take what is offered to them; that freedom of association has enabled trade unions to take away from people their reasonable right to work; that stoplists and price rings produce injustice, and a number of other points. The argument is that if lawyers were only more alive to their responsibilities, they could and would find proper remedies to put these things right.

It is this attitude towards the law that seems to me to contain very great and serious errors. The first is that " the law " means merely a part of what is in reality the law, that is to say that part of it which is generally the product of the Courts of Common Law and Equity. That is a view that is often unconsciously taken by law teachers, and most students absorb much of that outlook: the doctrine of consideration in contract is " law," but the Income Tax Acts are somehow not " law." But when one comes to live in the real hard world, far and away the most important laws are the expression of social policies laid down by Parliament, and these laws often seem to produce unjust results. Now I am all for law students regarding the profession of the law as something akin to a priestly function, and for lawyers being more interested in whether the law is just or not, but if they are to accept responsibility they had better see just where the garden path may lead to. The whole position of our judiciary is intimately related to the fact that our judges are not concerned with the validity or the policy of Acts of Parliament. The attitude that upsets Sir Alfred Denning, as when it is so smoothly said that if a result is unjust it is for Parliament to alter the law, is an expression of one of the fundamentals of our constitution. There have been occasions when the judges have been restive about some kinds of legislation, and the immediate reaction has been to make legislation " judge-proof." If the judges ever want to have a head-on collision with Parliament, all they have to do is to follow the main thesis of this book.

After saying that, do I intend to tell my students to read it? Of course they should, for the good is pretty good and the heresy won't stick enough to upset the apple-cart.

R. M. JACKSON.

# PUBLIC LAW

*Winter, 1956*

## COMMENT

OPINION is divided about planners. Personal temperament and its offspring, political philosophy, separate the sheep from the goats. But few of us are on the side of the planners or against them on consistent principle, and all depends not only on what is being planned but on the nature of the plan. So we will, at one moment, happily support plans to preserve our village green or municipal open space and, for the time, feel kindly towards all who assume in our name the burdens of sitting on committees, getting out figures, drafting memoranda and embarking on those and other exhausting activities without which, it appears, no plan can be born. If we find that public authority is also on our side and is busily preparing orders to protect the trees while vigorously, as men of spirit should, refusing building applications, our general enthusiasm will momentarily embrace all planners. But in no time at all we find that our own innocuous desire to build a simple lean-to garage against our house is frustrated by the rigidity of stupid regulations which are clearly not designed for our case, and by the complete lack of imagination and understanding of those very men who had earlier seemed so right-minded. If we were contented sheep before, we are angry goats now, and consign all planners of anything to the everlasting bonfire.

Not last town and country planners. Their dilemma is often caused by demands, on one side, that something, or some different things, should be done and, on the other, that nothing should be done. The Minister of Housing and Local Government has found himself in this position for, as he said somewhat plaintively in his letter to Oxford City Council, " It must be accepted that any decision, even a decision to do nothing, will be strongly disliked in one quarter or another." The Oxford roads controversy is, indeed, a problem for planners. It is understood that the Cabinet, despite its five Christ Church men (including the Prime Minister), has given its support to the plan produced (or adopted) by Mr. Duncan Sandys. Consideration of its merits and demerits is best left to those directly concerned, to those who have some professional qualification to speak and to those who, on these occasions, fight for places in the correspondence columns of the expensive newspapers. But the law and practice are worth looking at.

The statutory provisions and the events which have occurred are simply stated. The Minister approved the development plan for Oxford last year but suggested that the City Council should submit to him their proposals to relieve congestion in the High, the Broad and the narrow streets between. The Council therefore produced a scheme for two inner relief roads; one across the centre of Christ Church Meadow and the other through the south side of the University Parks. This scheme resulted in what the Minister has called " vehement protests," and so he visited Oxford himself last October and discussed with the Council the possibility of avoiding these two open spaces. It seems that he also talked about the problem with other persons and authorities. The Council then dropped their first scheme and put forward another, which they officially submitted to the Minister last November as a proposed amendment to the approved development plan. This second scheme was for one road crossing the Thames well to the south of Christ Church Meadow and for another linking Headington Road with St. Giles at the " Lamb and Flag." The Town and Country Planning Act, 1947, provides that local inquiries or hearings shall be held where amendments are proposed and an inquiry into the Council's second scheme, to which objections had been made, took place in February of this year. At this inquiry the northern road (through the " Lamb and Flag ") was strongly opposed. In September, the Minister stated that he felt " unable to approve " the second scheme. " At the same time," it was said on his behalf, " he recognises that, having rejected the scheme proposed by the Council, the latter may reasonably expect him to state the Government's own views on the problem." After restating some of the considerations, the letter continued: " Accordingly the Minister, in agreement with the Minister of Transport, requests the Council to submit as soon as possible final proposals for a new inner by-pass road to be used by through-going traffic in substitution for the High Street. He considers that this road should (a) start at the junction of the Headington, Cowley and Iffley roads, immediately east of Magdalen Bridge, (b) run along the northern side of Christ Church Meadow, just south of the Broad Walk," and the letter continued by detailing the rest of the route. And Magdalen Bridge is, under this plan, to be closed to all motor vehicles.

The Act of 1947 provides that " any local authority may at any time, and shall if so required by directions of the Minister, submit to the Minister proposals for such alterations or additions to the development plan relating to their area or any part thereof as appear to them to be expedient, or as may be required by those directions, as the case may be." The Minister's letter does not look like such a direction, but if Oxford City Council choose not to do as he wishes there is no doubt that he could direct them to do so. Moreover, the Act empowers the Minister to amend the plan if an authority shows itself unwilling to co-operate. As often, politics complements the law and the Minister would, no doubt, prefer to get his way without formally overriding the City Council which could, therefore, cause the Minister much political embarrassment by refusing to co-operate. Whether the City Council puts up proposals or the Minister acts in their default, the next stage will be a local inquiry. Then the Minister will be in a "New Town" rather than a "Planning Act" position. That is to say, he will be considering proposals which are either virtually or actually his own. The position of Christ Church and other opponents of the Minister's plan is not happy. It is true that at the local inquiry in February something very like the Minister's plan was put forward as an alternative to the Council's proposal. Perhaps with this in mind, the Minister said, in his letter, that at that inquiry "wide latitude was allowed for the expression of opinions, not only in regard to the Council's specific proposal, but also on other possible methods of dealing with Oxford's traffic problem." But the fact remains that that inquiry was into the Council's proposal and that the previous suggestion of a road across the Meadow had been abandoned because of the "vehement protests." So the opponents of the Minister do seem to be able to say, with some justification, that they have not had a proper opportunity to state the case against the Minister's plan before he decided on it. We understand that at the inquiry in February the representatives for Christ Church did, shortly, make this point, and were told that before any such plan was adopted there would have to be a further inquiry at which they could make their case. While this is indeed the situation, it may be doubted whether Christ Church or other opponents considered that that further inquiry might follow, and not precede, the Minister's decision.

Finally, the controversy shows the complexities and the realities of the relationship, especially under town and country planning legislation and practice, of Minister and local authority. It is proper that a local authority should initiate proposals for the future development of its area. It is also proper that, in the usual case, the Minister should approve these proposals in general, while having the power to modify them in particular. Is Oxford exceptional? If so, is this because of what the Minister so understandingly calls its "unique beauty"? Or because it is a university city? Or because the colleges themselves suffer from the traffic? (In this last case he might be persuaded to visit Houghton Street, Gower Street and the Strand.) The Minister himself seems to suggest that he is forced to intervene because the Council has failed to find a compromise between conflicting opinions. On that basis, he should intervene almost everywhere. We are not arguing that the Minister ought to remain aloof from Oxford's problems, which have indeed a wider significance than similar problems in other cities. But, in view of the considerable local opposition previously shown to a scheme for driving a road through the Meadow, he seems to be over-willing to exercise his statutory powers and over-anxious to show the authority of his Ministry. The Dean of Christ Church has indeed suggested that " the lack of an agreed local solution is very largely the result of the Minister's own attempt to influence the course of affairs." Perhaps history will be repeated (or myth given reality) and the head of a college will once more greet a Prime Minister with the overwhelming request: " Pray be brief."

THE new method of financing the borrowing of nationalised industries is summarised below (p. 389). For a limited period at least, the industries will obtain their money from the Exchequer and not through the issue of stock carrying a Treasury guarantee. Since nationalisation, over £1,600m. or about 60 per cent. of the total capital expenditure of the industries, has come from external borrowing. At first sight this new policy seems to run counter to the Government's handling of local authority borrowing which is being forced into the market. But the Chancellor of the Exchequer has pointed to two weaknesses in the position of the industries: first, they cannot, under the present Acts, pledge their undertakings as security, and they are not left with an unfettered ability to fix charges; secondly, the size of their requirements adds to the difficulty of flotation on their own credit. The disadvantages of the former system were, in the Government's view, that the " support " given by the Treasury when the stock was not fully taken up had to be given by borrowing the necessary funds on Treasury Bills and this impeded the operation of monetary control. Further, the necessity of making frequent issues on the basis of Government credit prejudiced the national programme of borrowing, re-financing and funding. At the same time, the Government would clearly like to be able to move in the direction of the recommendation of the Herbert Committee on the electricity supply industry (see above, p. 162) which stated: " The efficient use of capital would be encouraged if the Boards had to compete for capital funds on the market without the support of the Treasury guarantee, but this course could only be followed if it were also applied to other nationalised industries." The Opposition, which did not object to the Government's new method, would probably not support that recommendation. The present change is not regarded by the Government as implying any alteration in the existing division of responsibility between the Treasury, the Ministers concerned and the industries and, therefore, does not involve any enlarging of the scope for Parliamentary Questions.

The first effect of the new policy is that the industries have begun to repay the clearing banks in monthly instalments. The Treasury payments to the industries are also being made monthly; in August the payment was £27·2m. and in September £35·5m. Of this £62·7m., the Central Electricity Authority received £38m. These payments, of course, cover both the repayments to the banks and the capital needs of the industries, and the latter account for much the higher proportion of the total. The gas and electricity authorities have borrowed more from the banks (funding by means of a market issue later) than the British Transport Commission (which has normally made a market issue only). On August 15, before any repayments were made to the banks, the overdrafts of the nationalised industries with the London Clearing Banks totalled £111·7m. It is unofficially estimated that the repayments will average £8m. a month in the period to the end of March, 1957. The industries (except the air corporations) have decided to make their advances from the Treasury repayable over twenty-five to thirty years, and on this will probably be paying 5¼ per cent. The air corporations will take up seven-year loans and probably pay 5½ per cent.

SPECIAL attention should be called to the further publications of the Franks Committee (p. 396 below); to the observations of the Lord Chancellor on the recommendations of the Select Committees on Estimates concerning legal aid (p. 370 below); and to the rather unenthusiastic response of the Minister of Agriculture, Fisheries and Food to the recommendations of the Arton Wilson Committee on regional re-organisation (p. 372 below).

The range of subjects covered by the sub-title of this quarterly is wide and is reflected in the articles published in this issue. Mr. Hart's name is so well known because of his public life and his writings on local government that we need only express our thanks to him for writing on the new statement of Government policy. Professor Gledhill also has a wide reputation because of his work on Asiatic law. Mr. Grunfeld and Mr. Yamey have shown before how profitable, indeed how necessary, is the conjunction of lawyer and economist for the understanding of so many problems of our present society. We are indebted to all these contributors.

## LOSS OF SERVICES OF CIVIL SERVANT

*Inland Revenue Commissioners* v. *Hambrook*[1] has proved to be a less important case in public law than appeared likely at one stage. A tax officer, an established civil servant, who was riding a motor-cycle whilst off duty, collided with a motor-car driven by the respondent. It was admitted that he had been one-third and the respondent two-thirds to blame for the accident. In consequence of the injuries he sustained, the tax officer was absent from his employment for several months, during which period the Inland Revenue Commissioners paid him sick pay. In an action *per quod servitium amisit* the Crown claimed damages for loss of services of the officer.

At the trial Lord Goddard C.J. held that the material point was whether the relationship between the Crown and the officer was the ordinary contractual relationship of master and servant. Holding that there was no such relationship between the Crown and its officer, he entered judgment against the Crown, who appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal on an entirely different ground, *viz.*, that the action for loss of services lay only in respect of menial servants. The case furnishes an example of the way in which from time to time a series of cases reveals a clear and consistent change of judicial attitude to a particular cause of action. *Best* v. *Samuel Fox & Co., Ltd.*[2] and *Attorney-General for New South Wales* v. *Perpetual Trustees Co., Ltd.*[3] had shown a marked antipathy on the part of the Law Lords to the action for loss of services. Little wonder then that the Court of Appeal should follow the same line. The decision should, therefore, be regarded as a decision of judicial policy, although it was, as usual, supported by conventional judicial arguments, none of which was necessarily decisive. The main argument was the historical one that the action derived from the days when a servant was regarded as the " property " of his master, and that, since such an attitude to servants was no longer taken, the action must be now restricted to the class of servant characteristic of feudal society, the menial servant who was part of the household. There would have been nothing to prevent the court from extending the concept of " property " to other valuable assets, just as it has done in the case of injunctions so as to broaden the scope of that remedy.[4] The Court of Appeal examined such precedents as there were on the point, and found that they were consistent with their view; they could, however, just as easily have been used to justify a decision that other classes of servants were within the tort. Secondly, the court held that it was anomalous to allow one person to recover for damage to another. But much of the law of torts is concerned with the protection of relational interests both inside and outside the domestic sphere.[5] Thirdly, the court pointed out how unjust it was that if the action lay no reduction in the damages could be made on account of the contributory negligence of the servant; if this were unjust it was open to the Court of Appeal to redress it by apportionment—it clearly was not a point of principle on which to rest the case. Again, as is usual when judicial decisions of policy are made, no regard was paid in the judgments to the considerations of policy in favour of the action. The most powerful one is, that many servants are assets of great value to their employers, who may have spent much money in training them to be such profitable assets, and that, just as the courts have restrained by injunction competitors who sought to employ during their off-duty hours the plaintiff's expert and highly skilled staff on work of a similar rather secret character, so here a similar protection might be afforded.

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[1] [1956] 2 W.L.R. 919; [1956] 3 W.L.R. 643, C.A.

[2] [1952] A.C. 716.

[3] [1955] A.C. 457.

[4] *e.g.*, *Springhead Spinning Co.* v. *Riley* (1868) L.R. 6 Eq. 551.

It is submitted that the essential point is: is the interest which an employer has in his employees sufficiently important to be protected by the law of torts against negligent interferences by persons who are not aware of that relationship? Everything considered, there is much to be said for answering that question in the negative. Next, was the Court of Appeal justified in equating Crown servants with industrial servants for this purpose? It is thought that the court was right; that the interest of the Crown in its servants ought to receive no greater or lesser protection than that of other employers, and that the decision is to be welcomed in so far as it equates the Crown and other employers. For what it is worth, Her Majesty and the managing director of I.C.I. will still be able to sue those who deprive them of the services of their domestic servants by a tortious act—there seems no good reason for distinguishing domestic from all other servants.

The Court of Appeal made it perfectly clear that it is irrelevant whether there is a binding contract between master and servant. Obviously, therefore, whatever the Court of Appeal, and, *a fortiori*, Lord Goddard, at first instance, said about Crown servants is merely of persuasive value.

At the trial it was not contended that there was an enforceable contract—perhaps such a contention might have embarrassed the Crown in the future; the Solicitor-General made the more limited submission that there was a contract which could not be enforced against the Crown. Lord Goddard held that the employment of an established civil servant " depends not on a contract with the Crown but on appointment by the Crown, though there may be . . . , exceptional cases, as, for instance, an engagement for a definite period, where there is a contractual element in or collateral to his employment."[6] At the same time, he recognised that an established civil servant could sue on a *quantum meruit* for arrears of pay.

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[5] See especially Green, " Relational Interests," in 29 *Illinois L.R.* (1935), 1041.

In the Court of Appeal Denning L.J. provided further evidence that English courts are realising the status and value of judgments in the High Court of Australia. Following Dixon C.J., Denning L.J. would have held in any event that a tax officer (like the police officer in the *Perpetual Trustee* case) has sufficient discretion to take him out of the category of a servant to whom this cause of action applies. Some of the dicta of Parker L.J. can only be understood in the light of the Solicitor-General's concession that the more senior civil servants are " officers in the civil employment of Her Majesty " to whom an action for loss of services did not apply. Parker L.J. said that all established civil servants, whatever their grade, were " officers in the civil employment of Her Majesty "; in the light of the concession, that would have been enough to dispose of the case. He also observed [7]:

> " The fact of service undoubtedly exists in every case between the Crown and those in its employ, even though that service is rendered under conditions in which either there is no contractual relationship or, if there is, the Crown can dismiss the employee at will."

Birkett L.J. did not utter any *obiter dicta* on the position of civil servants.

Clearly, future actions for loss of services cannot be expected to throw light on the nature of the relationship between Crown and civil servants. Actions based on *Lumley* v. *Gye*[8] may, however, do so, for there is nothing in *Inland Revenue Commissioners* v. *Hambrook* to prevent an action from being brought by an employer (either the Crown or otherwise) against a third party who has *knowingly* interfered with a *contract* of service between that employer and his servant.

H. S.

## DISSOLUTION IN TASMANIA

A CONSTITUTIONAL crisis in Tasmania in September, 1956, was solved by the grant of a dissolution in circumstances providing some precedent, both positive and negative, for the guidance of State Governors in such cases. On September 11 a Minister in the Cosgrove Labour Government left the Labour Party and joined the opposition Liberal

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[6] At pp. 926–927.

[7] At p. 656.

[8] (1853) 2 E. & B. 216.

Party. At the general election of February 19, 1955, these two parties had each won fifteen seats (a situation which the even division of political opinion together with the Haire-Clark system of proportional representation makes likely). Thus, the Liberal Party now had sixteen votes to fourteen, or fifteen to fourteen, after providing a Speaker, and promptly secured a no-confidence vote against the Government. The Constitution Act (No. 2), 1954, specifies that when a general election for the House of Assembly produces equal representation for two parties, the Electoral Commission should certify which party obtained a majority of primary votes; the party so certified is then enabled to obtain a floor majority of one and form a government either by the other party supplying the Speaker or by the election of an additional member. In 1955, the Labour Party was " certified " and duly took office, the Liberals supplying Speaker and Chairman of Committees. The 1954 Act also provided that in such cases the duration of the Parliament should be three years (instead of five).

When the Labour defection mentioned above took place, the Governor, Sir Ronald Cross, was out of Australia, but returned by air; the Premier, Mr. Cosgrove, advised him to dissolve the House of Assembly and hold a general election, and the Attorney-General submitted a long memorandum on the practice of the King, and of Governors-General and of Governors in the British Commonwealth, supporting this advice. The Governor also consulted the Leader of the Opposition. On September 20 the Governor announced that he had accepted the Premier's advice to dissolve. In a short memorandum the Governor said he did not accept the view that Ministerial advice to dissolve should be followed unless in extreme circumstances. Nor did he regard it as relevant that the advice came from a party which had obtained a certificate under the Act of 1954. On the other hand, he noted that he was satisfied the Opposition could have formed a government capable of granting Supply. The memorandum did not state in clear terms what were the circumstances which *did* justify the dissolution, but it may be conjectured that the following were the most important factors: the House had lasted for more than half its due term; the crisis had arisen because a member had not merely withdrawn his support from a government (as frequently happens in Tasmania in the case of Independents) but had withdrawn from the Party under whose auspices he had been elected; finally, there was advice to dissolve from a Premier of high personal repute who had been in office for a long time. Although the Governor did not accept the view that advice to dissolve should be accepted automatically, his action is consistent with the view that there is a heavy onus on the party wishing to persuade a Governor not to accept such advice.

G. S.

## COUNCILS, MINISTERS AND CABINETS IN AUSTRALIA

PROFESSOR G. SAWER writes: "I am indebted to Mr. Andrew Garran, Victorian Parliamentary Draftsman, for pointing out a historical error in my article on Australian Cabinets in *Public Law*, where it is stated (at p. 113) that Victoria abolished re-election of Ministers in 1859. The Victorian Act, No. 91 of 1859, did repeal the sections of the Constitution Act of 1855, which, in terms, required Ministers to seek re-election on appointment, and the substituted section could have been read as giving independent validity to the 'sitting' as well as to the 'election' of persons appointed to Ministerial office. But the 1859 Act was passed *alio intuitu*: the tradition of re-election was so strong as to dominate interpretation, and re-election continued with only minor statutory ameliorations until its final explicit abolition by the Act No. 2578 of 1914. Mr. Garran notes that during the intervening period, there were over 300 by-elections on the appointment of Ministers, in at least ten of which the Minister concerned was defeated."

## APPEALS UNDER SECTION 8 OF THE RATING AND VALUATION (MISCELLANEOUS PROVISIONS) ACT, 1955

SECTION 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, introduced an important measure of relief from rates for hereditaments occupied by what may be compendiously, but inaccurately, described as charitable organisations. Although the section contains detailed provisions both as to the hereditaments entitled to relief and as to the extent of that relief, it gives no indication of how the occupier of an eligible hereditament can remedy a refusal by the local rating authority to make the appropriate reduction in the chargeable amount. Those practitioners who study the pages of *Hansard* must have felt slightly apprehensive on reading of the Government's view that the appropriate procedure would be by way of appeal to quarter sessions under the Poor Relief Act, 1743.[9] All practitioners are now alarmed to discover by a process of elimination that Parliament has seen fit to adopt that view.

There are four possible methods by which rating grievances can be remedied:

(1) By appeal to the Local Valuation Court. The right of appeal to this tribunal is limited to persons whose grievances arise either from the value ascribed to a hereditament in the Valuation List or from the inclusion therein of an exempt hereditament.[10] Section 8 of the 1955 Act is concerned with neither assessment nor exemption.

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[9] *Hansard*, July 11, 1955, col. 586.

[10] Local Government Act, 1948, ss. 40, 44.

(2) By contesting an application for a distress warrant. There is great uncertainty as to how far a ratepayer can raise objections at the hearing of such an application. The position would seem to be that the justices can determine an allegation that the rating authority have acted in excess of jurisdiction, but not an allegation that they have acted erroneously in the exercise of their jurisdiction.[11] A defence of total or partial exemption appears to be a defence of excess of jurisdiction if it can be established without reference to disputed facts [12]; and a plea that the amount charged exceeds the amount allowed by section 8 of the 1955 Act may well fall within that category (so long as the facts are undisputed).[13] However, apart from the uncertainty which has been mentioned, contesting a distress warrant as a method of obtaining relief under the 1955 Act obviously leaves very much to be desired.

(3) By appeal to quarter sessions. The right of appeal to quarter sessions is given by section 4 of the Poor Relief Act, 1743, to a person:

> " aggrieved by any rate made for the relief of the poor, or [who] shall have any material objection to any person or persons being put on or left out of such rate, or to the sum charged on any person or persons therein, or [who] shall have any material objection to such account as aforesaid, or any part thereof, or [who] shall find him, her, or themselves aggrieved by any neglect, act, or thing done or omitted by the churchwardens and overseers of the poor." [14]

It is now practically impossible to attack the rate itself [15]; but the failure by the rating authority to implement section 8 of the 1955 Act would appear to be a sufficient neglect or omission to found an appeal.[16]

(4) By obtaining a declaratory judgment in the High Court. Declarations can be made in respect of rating questions,[17] but in no circumstances will a declaration be granted if there is an alternative

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[11] Ryde, *Rating*, 10th ed., p. 850.

[12] *Whenman* v. *Clark* [1916] 1 K.B. 94, 111, 112; *Shillito v. Hinchcliffe* [1922] 2 K.B. 236, 245; *Churchwardens of Birmingham* v. *Shaw* (1849) 10 Q.B. 868; Ryde, *op. cit.*, pp. 864–865.

[13] This is the opinion of the learned editors of Ryde, *op. cit.*, p. 184.

[14] The churchwardens and overseers of the poor have been supplanted by the local rating authority. Rating and Valuation Act, 1925, s. 1 (2). The text of s. 4 of the 1743 Act has been somewhat ravaged by the Statute Law Revision Acts, 1888 and 1948.

[15] For only exceptionally will it offer any target: Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 4 (2) (*a*) and (*b*).

[16] See Scrivens and Goodfellow, *Law of Rating* (1955), p. 51, n. (*q*). The learned editors of Ryde (*op. cit.*, p. 184) think that an appeal to quarter sessions " may be difficult though perhaps not impossible," but they do not appear to have considered the effect of the final phrases of s. 4 of the 1743 Act.

[17] *Barwick* v. *South Eastern and Chatham Ry.* [1921] 1 K.B. 187, 200, 202.

mode of procedure.[18] As has been indicated, a person who desires to contest a rating authority's refusal to implement section 8 of the 1955 Act has an alternative mode of procedure.

The practitioner is justifiably alarmed at the prospect of having to re-master those archaic and half-forgotten intricacies of rating procedure at quarter sessions which it was universally thought had been (save for the most exceptional cases) consigned to limbo as being entirely unsuited to present day conditions. However, whilst deciding (for example) whether he need advise personal service of a notice of appeal upon the chairman of the local parish meeting,[19] he may console himself with the thought that others may be suffering even more acutely, since some charitable organisations have probably already foundered upon the rocks of Georgiana. Appeals must be entered at the " next " quarter sessions after publication of the rate,[20] and despite the gloss that has been put on the word " next " [21] there must be many organisations which, due to a justifiable ignorance of their rights of redress, are already out of time in respect of the 1955–1956 rate.

Comment is needless, and could hardly fail to be impertinent, but is it too much to hope that an overworked Parliament will spare time both for a second thought and for a consideration of the merits of the Lands Tribunal?

MICHAEL MANN.

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[18] *Barraclough* v. *Brown* [1897] A.C. 623; *Bull* v. *Att.-Gen. for N.S.W.* [1916] 2 A.C. 564.

[19] See Overseers Order, 1927 (S.R. & O. 1927, No. 55), cl. 14 (3).

[20] Poor Relief Act, 1743, s. 4.

[21] Ryde, *op. cit.*, pp. 810–813.

# RESTRICTIVE TRADE PRACTICES ACT, 1956

C. Grunfeld and B. S. Yamey

## I. THE ECONOMIC ASPECT

The Restrictive Trade Practices Act, 1956, is the third piece of legislation relating to monopolies and restrictive practices to be placed on the Statute-book since 1948.[1] This is a high rate of productivity in terms of statutes. But so far, at least, the legislative activity has not yielded much positive result in the removal of restrictive business practices. It must be an open question whether the present statute will accelerate the demise of restrictive arrangements, which, according to the President of the Board of Trade (in a sentence apparently contradicting the approach of the legislation he was introducing), exact " a price which, in an age of rapid technical change, we can ill afford to pay."[2] Apart from the specific prohibition of the collective enforcement of resale price maintenance, the new Act does not at one sweep dispose of the thicket of restrictive arrangements which encumbers the exercise of individual business initiative and inhibits the working of competition in many areas of industry and trade. Rather, it reiterates the approach, " traditional " since 1948, of having each case judged on its merits, the main and significant change being the replacement of one set of judges by another. And it would be rash, since the Act itself provides little real guidance, to predict the decisions, and the rate of decision-making, of the new Restrictive Practices Court.

The Monopolies Act, 1948,[3] provided for the setting up of the Monopolies and Restrictive Practices Commission entrusted with the duties, mainly, of investigating particular monopoly situations referred to it by the Board of Trade, and making recommendations for remedial action where, after examination, it is held that the monopoly or restrictive arrangements operate, or may be expected to operate, against the public interest. The emphasis is on the examination of

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[*] Mr. Grunfeld is Reader in Law, and Mr. Yamey Reader in Economics at the London School of Economics and Political Science, University of London.
Section I of this paper is by Mr. Yamey, and Section II by Mr. Grunfeld.

[1] Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948; Monopolies and Restrictive Practices Commission Act, 1953; Restrictive Trade Practices Act, 1956.

[2] H.C. Debates, March 6, 1956; Vol. 549, col. 1940.

[3] The provisions of the Act, and the action taken under it to July 1955, are analysed by me in W. Friedmann (ed.) *Anti-Trust Laws* (1956), pp. 361–402.

individual situations and the recommendation of remedies devised to meet the needs of individual situations. The method or approach has come to be called the case-by-case method, or as an American observer has put it, the " pragmatic " method as compared with the " dogmatic " method of the American anti-trust legislation.[4]

The Commission's duties are confined to investigation, report and the making of recommendations. Under the Monopolies Act it is for the appropriate Minister to decide what action should be taken on the report, and where a statutory order is deemed necessary the approval of Parliament is also required; that is to say, remedial action is by way of administrative or legislative measures.

The Monopolies Act, in a supplementary provision, enables the Board of Trade in certain circumstances to require the Monopolies Commission to investigate specified restrictive practices throughout industry and trade. The first general reference of this kind issued in 1955 is the Commission's *Collective Discrimination—A Report on Exclusive Dealing, Collective Boycotts, Aggregated Rebates and other Discriminatory Trade Practices.*[5] The present Restrictive Trade Practices Act, which modifies considerably the Monopolies Act, is the legislative outcome of this report.

In its general report the Commission considered six classes of agreements or arrangements restricting competition. It did not produce a unanimous report. On the major issues seven of the ten members reached the conclusion that the practices are against the public interest and should be prohibited by law, though some arrangement should be made whereby exemptions could be granted, after investigation, on one or other of four specified and limited grounds. This was a recommendation to break away from the case-by-case approach, though the recognition that there might be exceptional cases meriting exemption—the majority group made it clear that in their work they had not met any deserving case—was a partial concession to the " pragmatic " approach. The minority of three members, however, would not countenance any generalisation or propose any general prohibition of any class of restrictive arrangement. They proposed that restrictive agreements should be registered, and that investigation and treatment of individual cases should proceed on the case-by-case method. The present legislation rests heavily on the minority proposals, except that it contains, as previously noted, an unconditional prohibition of collectively enforced resale price maintenance.

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[4] C. Kaysen, " Restrictive Practices Bill: An American View," London and Cambridge Economic Bulletin, new series, No. 18, in *Times Review of Industry,* June 1956.

" ' Pragmatism ' continues to be elevated above ' dogmatism,' by which is meant that a desire to explore how each particular market situation works, and evaluate its performance in concrete terms, is the central guide to policy which all parties accept, rather than any broad appoach which places its reliance on the desirablity of competition as such. . . ." One might add that another school of dogmatists approves of restrictive agreements or arrangements.

[5] Cmd. 9504. For a fuller discussion of this report, see my review article in 19 *Modern Law Review*, pp. 63–75.

## RESTRICTIVE BUSINESS AGREEMENTS

The first of the three substantive parts of the Act provides for the registration and investigation of a wide range of restrictive business agreements affecting the home market.[6] The agreements or arrangements are, broadly, those between two or more business firms as suppliers or as buyers containing restrictions as to prices, quantities or qualities of goods, and channels of distribution.[7] The provisions are sufficiently widely drawn to cover all the main types of restrictive agreements and arrangements brought to light in the fourteen reports of the Monopolies Commission on individual industries published to date. Not unexpectedly, and in line with the provisions of the Monopolies Act, restrictive practices in the labour market are excluded from the scope of the Act. These are to be examined and (presumably) dealt with in other ways; though it may be noted in passing that since 1948, despite undertakings given then, there is no sign of real activity in this important field. Restrictive agreements affecting services (as opposed to goods) are also excluded.[8]

It is clear that the Government hopes that the requirement to register restrictive agreements, and the publicity of a register accessible to all and sundry, will induce many firms and industries to give up their restrictive practices. Here they can derive some support from experience with compulsory registration, as in Sweden for example. Some firms, it is known, are anxious to avoid publicity or are loth to be associated with an agreement which they might subsequently have to justify before a court of law. On the other hand, there is a general feeling in industry and trade that restrictive agreements of the kind to be registered are beneficial not only to the participants but also more generally; the strength of this feeling weakens the prospect of widespread voluntary dissolution of restrictive practices. It is more likely that there would be some jettisoning of registered agreements should the new court adopt a critical line in the first cases to be heard by it.

[6] The four parts are: I. Registration and Judicial Investigation of Restrictive Trading Agreements; II. Enforcement of Conditions as to Resale Prices; III. Amendments of Monopolies and Restrictive Practices Acts; IV. Supplemental.

[7] Ordinary contracts of sale involving one buyer and one seller are not affected.

Not all agreements by suppliers to restrict competition are subject to the Act. For example, an agreement by a group of manufacturers not to spend more than a prescribed amount on advertising, or not to use certain forms of advertising, would not seem to fall within the list of agreements to be registered.

[8] "The principal argument for sticking to goods and excluding services is that we really have a vast field to cover already. . . . Secondly . . . services are coming very close to restrictive practices of labour": (H.C. Debates, March 6, 1956; Vol. 549, col. 1942).

At this stage the observer, like many industries and firms, must wait and see.

Since 1948 the Monopolies Commission has investigated and assessed restrictive agreements (of the kind now to be registered) referred to it for examination, and Ministers have decided what to do about them. Henceforth, the Restrictive Practices Court, composed of five judges of High Court status and up to ten lay members " qualified by virtue of [their] knowledge of or experience in industry, commerce or public affairs," is to decide whether particular registered agreements, " challenged " by the independent Registrar of Restrictive Trading Agreements, are to be allowed to continue.[9] This change in the machinery is the major novelty of the Act. Matters which had previously been judged by the executive, guided (but not bound) by the advice of an independent expert body, are now to be submitted to the judiciary.

This change was advocated by influential sections of business opinion, and it relieves the executive of what, one suspects, must have been an awkward and uncongenial task. But it is debatable whether it is a desirable change in arrangements. For, as the President of the Board of Trade made clear, the executive is transferring to the judiciary the task and responsibility of making decisions which involve far-reaching social and economic judgments. It is no exaggeration to say that the activities of the court may, in time, either confirm, with or without incidental changes, the present pattern of restriction in many branches of industry or trade, or, alternatively, remove the shackles on individual enterprise and business competition, which, in turn, might lead to other major changes in the structure of industry and trade. It is difficult to believe that a branch of the judiciary, even with the help of ten experienced and knowledgable lay members, is the appropriate body for determining a significant part of the environment in which economic activity takes place.[10] It is also difficult to believe that the present solution is likely to be the final development in policy regarding restrictive agreements. The present solution takes the issue out of the political sphere for the time being; but, by placing economic matters in the hands of the judiciary, it makes it almost inevitable that those in the political sphere will eventually reassert their interest in these matters and their claim to have the major voice in their settlement.

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[9] There is provision for appeals on questions of law.

[10] The completeness of the surrender of the powers and duties of the executive should be emphasised. The choice of agreements to be challenged before the court is left entirely to the Registrar. Once particular classes of agreement have been registered—and the undertaking has been given that all classes will be called up in due course—the Board of Trade will have no influence on the bringing of actions in the new court.

The arbitrariness of the decision to hand over problems of restrictive agreements to the judiciary is underlined by the decision not to hand over to it the problem of assessing restrictive agreements affecting exports. These agreements " raise great issues of commercial and sometimes even of foreign policy " and are therefore " somewhat different from those which are made justiciable " in the Act.[11] But it is clear that the fate of a restrictive agreement affecting the structure and domestic performance of a major industry raises questions of economic policy far more serious than those raised by many of the minor agreements concerning exports. And it is not at all unlikely that some purely domestic agreements may have the effect of weakening the competitive power or energy of industries in export markets, thereby impinging upon the prime aim of commercial policy, that of stimulating exports.

### PRINCIPLES TO BE APPLIED BY COURT

Parliament has, however, laid down principles for the guidance of the court in deciding where the public interest lies. It has been claimed that the right division of responsibility is for Parliament to lay down principles, and for the court to interpret and apply them in individual cases; but, as will be shown, the statement of " principles " is seriously incomplete.

The public interest is not defined (as is done in the Monopolies Act) but, in section 21, the court is required to hold that an agreement before it is against the public interest unless it is satisfied that the agreement has merit on any one (or several) of seven stated grounds, and that the merit is not outweighed by the disadvantages caused by the agreement to the public, consumers, competitors or potential competitors. The seven grounds on which merit can be claimed are broadly as follows: (a) the restriction is necessary for public safety; (b) the restriction confers other " specific and substantial benefits or advantages " on consumers; (c) the restriction counteracts the monopolistic or restrictive activities of others; (d) the restriction is necessary to enable the parties to negotiate " fair terms " with strong buyers or sellers; (e) the removal of the restriction would lead to significant regional unemployment, or (f) would seriously reduce export earnings; (g) the restriction is necessary to support other restrictions found to be in the public interest.

The examination of the facts alone will not take the court all the way in deciding the issues before it. The likely effects of the removal of a restriction cannot be arrived at by an examination of the facts of the present situation. Recourse to some " theory " is inevitable, however much the reluctant " theorist " may try to conceal this from himself, and however much he may seem to be distilling conclusions from observed facts. The Act does not specify what sort of theoretical presuppositions must inform the court in its essays into economics; the key " principles " are left unstated by Parliament. (Indeed, if it had stated them, it would have adopted a " dogmatic " approach.) Similarly, examination of the facts cannot by itself establish the relative weights to be given to each of several possible advantages and disadvantages stemming (or believed to be stemming) from a restrictive agreement. The Act does not equip the court with a ready-made and approved set of weights. The court will therefore have to adopt, consciously or unconsciously, a theoretical framework to guide its thinking, and a set of weights for comparing advantages and disadvantages. However " judicial " the proceedings of the new court may be, the theories and weights it employs cannot be " judicial " in any meaningful sense; and its findings, when adverse to business interests, are likely to invite the same sort of criticisms as those provoked by some of the reports of the Monopolies Commission. The nature of the problem of assessment cannot be altered by changing the venue of the assessment; and " dogma " cannot be excluded even in the ostensibly most " pragmatic " approach.[12]

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[11] H.C. Debates, March 6, 1956; Vol. 549, col. 1943.

The necessity to weigh advantages against disadvantages (specifically recognised in section 21) itself seems to preclude the development, in time, of a set of precedents which would speed up proceedings [13]—

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[12] A specific illustration may be useful here. It is often urged in favour of common price agreements among manufacturers that they stimulate research: they give the firms somewhat larger profits and greater stability so that more is available for research and the atmosphere is more conducive to long-term projects, and they build up confidence between firms so that they exchange research findings and experience. Presumably such effects may be said to constitute " specific and substantial " benefits to consumers. Now in examining a particular case the investigator can determine how much is being spent on research and to what extent competitors are pooling their experience. But no examination of the facts, past or present, can determine whether research would be prosecuted more or less extensively and vigorously in the absence of the price agreement. The investigator may prefer the " theory " that unfettered competition erodes profit margins so that little is available for research; alternatively, he may believe that the more intense struggle for business in the absence of agreements provides a more urgent spur to research for improving products or cutting costs. The study of the facts of a given situation, or of s. 21 of the Act, will not help the investigator in making his choice. Moreover, even if the agreements promote research, the emphasis to be given to this result has to be determined, particularly as it may be achieved at the expense of higher prices (at least in the short run), a more rigid price structure, and, possibly, a tendency towards lower efficiency. The Act contains no principles which can be applied readily to any particular situation.

[13] Kaysen writes: " It is difficult to see just how the balancing act can create a consistent set of precedents from which decisions can be predicted even within a wide margin, unless the courts sticks fairly closely to one or another extreme of rejecting all arguments for exceptions or accepting all that the parties are able to make."

The difficulties of establishing reasonably unambiguous and easily applicable precedents can be illustrated from the assessments by the Monopolies Commission a possibility envisaged in section 23 (2) (*c*). Even if the same set of weights is employed consistently, it cannot be assumed, without inquiry, that the extent of the advantages and disadvantages of a particular type of agreement is the same in all industries. Indeed, the emphasis on the case-by-case approach and on the wisdom of judging each case on its merits seems to be incompatible with the development of firm precedents capable of serving as a reasonably objective basis for summary judgment. It is not consistent for supporters of " pragmatism " to seek an escape from one of their difficulties—the slow pace of investigation and action—in the " dogmatism " they disapprove of. Moreover, recourse to summary judgment based on precedents is perhaps not likely to appear to be just to those industries or firms whose pleas would be curtailed.

Professor Kaysen has expressed the view that " with respect to the standard of public interest against which restrictive agreements are tested, the new Bill [now Act] appears to be a retreat from the 1948 Act; the grounds for exemption seem broader, and the weight given to them greater." I cannot agree with this assessment, for the relevant section (section 14) of the 1948 Act expressly states that " all matters which appear in the particular circumstances to be relevant shall be taken into account." The new Act lists seven tests and allows no other considerations in favour of the agreements. This argues, superficially, that the new Act is less lenient to restrictive agreements. However, in practice, the breadth of the grounds for exemption will depend largely upon the interpretation of terms such as " reasonable and fair " and, even more, of the phrase " specific and substantial benefits or advantages " to consumers (in s. 21 (1) (*b*)). The position seems to be, in short, that the dictum of the first chairman of the Commission, that " Parliament has laid down no kind of general policy at all " [in the 1948 Act], is equally applicable to the new Act. If this is so, the apparent placing of the onus of proof on the industries is of minor importance, as is the difference in wording between the two " definitions " of the public interest; the real issue is the simple one whether the Restrictive Practices Court will be more or less critical of restrictive arrangements than the Monopolies

of price agreements and of arrangements for consultations on prices. It has condemned some of these arrangements without qualification; it has sometimes found that they would be in order provided that some form of official supervision were instituted; it has sometimes discovered positive merit, and sometimes noted absence of demerit, in the arrangements; and it has sometimes indicated that price agreements (without sanctions for their enforcement) would be acceptable alternatives to more stringent restraints on competition. In arriving at its conclusions the Commission has taken into account considerations such as the strength of competitors outside the agreement, the availability of substitute goods, the nature of collective action associated wih collaboration on prices, and the strength of buyers *vis-à-vis* sellers. It does not seem possible to reduce all this to a workable formula permitting of summary judgment of individual cases.

Commission has been. And speculation on this issue would be futile though two general points are worth making. First, the Commission has found that some restrictive agreements have yielded advantages or benefits in the public interest; these advantages or benefits could be translated so as to satisfy one or other of the grounds for approval listed in section 21 of the new Act, without having to strain its language unduly. Second, the Commission has on occasion refrained from recommending that an agreement be terminated apparently not because of its positive merits but because of the absence of positive demerits [14]; under the new Act, however, an agreement can be allowed to continue only if the court is satisfied that one or other of the listed advantages is present.

## PRICE MAINTENANCE

Part II of the Act deals solely with the practice of resale price maintenance. The gist of the provisions is that the collective enforcement by suppliers of resale price conditions is no longer lawful, while it is now made easier for any one supplier to enforce his own prices without collective action. As collective enforcement—the collective withholding of supplies from price-cutters—has been the most effective and easily operated method for controlling resale prices, the rigour of price maintenance in some trades is bound to be relaxed. The private trade courts, which have aroused a good deal of public and parliamentary displeasure, will no longer function in this field. On the other hand, a manufacturer will be able to take a price-cutting retailer to court even if there is no contract (stipulating resale prices) between them. It certainly strengthens the hand of the manufacturer who is prepared to put up with the publicity of taking legal action against a retailer who, from whatever motive, is reducing the retail price of some commodity.

To those concerned with the question of " pragmatism " *versus* " dogmatism," Part II is of special interest; for in it Parliament foresakes the " pragmatic " approach. Collectively enforced resale price maintenance is unlawful; no court or tribunal is asked to look at each instance separately. Individually enforced resale price maintenance, *per contra*, is both lawful and legally enforceable.[15] The manufacturer does not have to establish that the maintenance of his resale prices is in the public interest or that he has suffered damages from the reseller's price-cutting. The Government resisted the suggestion that each case should be decided on its merits.

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[14] A clear example of this is in *Report on the Supply and Export of Pneumatic Tyres*, para. 532. Tyre manufacturers operate an aggregated rebate scheme for the sale of giant tyres to commercial vehicle manufacturers. This was held not to be against the public interest on the grounds that all the United Kingdom tyre producers participate in the scheme (so that it does not weaken the competitive position of any domestic producer), and that it is not supervised or rigidly observed. No positive advantage of the scheme in the public interest is mentioned in the Report.

[15] It is fair to add that, on the facts being proved, the court (here, the ordinary courts and not the new Restrictice Practices Court) may " if it thinks fit " grant an injunction restraining the price-cutter; apparently it need not grant an injunction automatically.

### POWERS OF MONOPOLIES COMMISSION

Restrictive agreements and arrangements which are subject to registration under the Act are removed from the purview of the Monopolies Commission; this is the essence of Part III of the new Act. In the future investigations of the Commission, the Commission shall disregard registrable restrictive agreements in deciding whether there are monopoly conditions (within the meaning of the 1948 Act), in assessing the effects of monopoly conditions on the public interest, and in making its recommendations. There is to be no chance of conflict between the Commission and the new court. Since the Commission in the past has been concerned primarily with such agreements and arrangements, the new Act both redirects the course of its activity and narrows its field of work. It will now be concerned primarily with conditions in which one firm buys or sells one-third or more of the goods in question, and with export agreements made by firms producing one-third or more of the goods.[16] These situations have not hitherto been prominent in the work assigned to the Commission. In view of the curtailment of its field of interest, the size of the Commission has been reduced from a maximum of twenty-five to one of ten members.

Henceforth on restrictive agreements affecting the home market the Registrar will initiate inquiries and the Restrictive Practices Court will decide whether mischiefs are present and should be eliminated; on monopolies and export agreements the Board of Trade will initiate inquiries, the Monopolies Commission will conduct inquiries and make recommendations, and the responsible Ministers will decide what should be done. Division of labour normally leads to a better performance of the divided tasks. To some extent the division of responsibilities and duties may have this effect in the field of the investigation and control of monopolies and restrictive practices. But a qualification has to be made. Often monopoly conditions (the structure of industry and the behaviour of individual firms) and restrictive agreements and arrangements (the behaviour of groups of firms) are so closely interwoven in their effects that something will be lost when each part has to be looked at and treated in isolation. It was a great merit of the original approach in the Act of 1948 that the Commission was asked to look at situations in all their aspects.[17] This is now forfeited.

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[16] The President of the Board of Trade has said that the new Commission would be concerned with "single-firm monopolies" and export agreements. It may be noted, however, that the definition of monopoly conditions in the 1948 Act is wide enough to include situations in which no supplier supplies as much as one-third of the market and in which there are no restrictive agreements or arrangements among suppliers. The definition is sufficiently wide to cover situations in which there is non-collusive price leadership, and those in which a number of manufacturers independently have arrangements which restrict competition among their customers (*e.g.*, resale price maintenance and exclusive dealing). For a more detailed discussion, see Friedmann (ed.), *op. cit.*, pp. 365–367.

The Monopolies Commission, despite the subtraction from the scope of its investigations, is left with a wide field; there are a number of branches of industry in which one firm occupies a commanding position. It may be expected, too, that the number of " monopoly " situations would increase if the Restrictive Practices Court should, in due course, prohibit collective agreements which are deemed by their participants to be vital to their business interests. If groups of firms were unable to achieve their objectives by collective arrangements, there would be an incentive for the participants to amalgamate; what could not lawfully be secured by collective agreements, could then be secured by a merging of interests. This is a possible development which may call for vigilance on the part of the Board of Trade. It may be noted that it is not possible in our law relating to monopoly to prevent an amalgamation which may have the effect of creating a monopoly situation or of significantly lessening competition. Unlike the position in the United States, there is no machinery for dealing with monopoly in its incipiency.

## II. THE LEGAL ASPECT

The main purpose of the second section of this paper is to describe the machinery through which it is intended to implement the policies analysed above. In addition, a glance will be taken at the relation of the new law to the common law relating to contracts in restraint of trade and civil conspiracy.

The primary provisions of the new Act involve the registration of a wide range of restrictive trade agreements or arrangements and the adjudication of their legal validity. As part of the machinery for carrying out these provisions, two new governmental agencies have been created: the Registrar of Restrictive Trading Agreements and the Restrictive Practices Court.

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[17] In terms of the Monopolies Act the Board of Trade may ask the Commission to confine its appraisal to a particular practice or practices. This type of limited reference has been made only once, apparently because, as was explained, one practice " is almost inextricably interwoven with many other practices and it is not at all easy to separate the one from the other ": (H.C. Debates, July 23, 1952, Vol. 504, cols. 568–569).

The new Registrar will be able to challenge simultaneously related registered agreements, and some of the difficulties of partial investigation could be avoided.

## REGISTRATION

### *The Registrar*

The Registrar has three principal functions, namely: (i) to compile a register of restrictive trade agreements as defined by the Act [18]; (ii) to build up and run the Registry, appointing staff and establishing their conditions of service (within limits set by the Treasury) and laying down regulations for the proper maintenance of the register and its availability for public inspection [19]; and (iii) to take proceedings before the Restrictive Practices Court in respect of the validity of agreements on the register.[20] Here, attention will be concentrated on the Registrar's duty to compile the register.

### *Registrable Agreements*

The new legislation does not apply to trade restriction agreements between partners or between the subsidiary and holding companies—the "interconnected bodies corporate" [21]—constituting one of the commercial monoliths that to a considerable degree dominate the modern economic scene.

It applies to contractually based trade combinations, whether the combination take on a corporate form or the form of an unincorporated trade association [22] or of a commercial combination not formally constituted but resting on a simple contract, agreement or arrangement among its members. It applies also to other simple contracts, agreements or arrangements [23] by which two or more of the parties accept any one or more of the trade restrictions enumerated in the Act.

At this point it should be stressed that the question of registration is entirely separate from and independent of the question of validity,[24] which has already been discussed.[25] All agreements containing trade restrictions as required by the statute must be registered, even though it is as clear as daylight that the agreement in question will readily be validated by the Restrictive Practices Court under one of the permitted heads of justification. Furthermore, even after the court has found in favour of or against a particular agreement, its terms will (with an indorsement of the court's decision) apparently remain on the register, which in this respect will provide a permanent record of all restrictive trade agreements in the United Kingdom falling within the purview of the Act since the start of its operations.[26] If businessmen wish no public record to be kept of their restrictive agreements at the present time, they must abandon them before they have to be registered.[27]

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[18] s. 1 (2).

[19] ss. 1 (2) (4), 11, 19.

[20] s. 1 (2).

[21] ss. 6 (8), 36 (1).

[22] s. 6 (8).

[23] For the remainder of this paper, the word "agreement" alone will be used and where used may be taken to include as in the statutory definition "any agreement or arrangement, whether or not it is intended to be enforceable (apart from any provision of this Act) by legal proceedings": s. 6 (3).

[24] Save so far, of course, as registration is a pre-condition of proceedings on the question of validity.

[25] See Section I, *supra.*

Which agreements, then, should be ultimately registered? The answer is agreements between persons carrying on business within the United Kingdom under which two or more of the parties accept restrictions [28] in respect of any one or more of the following matters, *viz.*: —

(1) " the *prices* to be charged, quoted or paid for goods supplied, offered or acquired, or for the application of any process of manufacture to goods ";
(2) " the [other] *terms or conditions* on or subject to which goods are to be supplied or acquired or any such process is to be applied to goods ";
(3) the *quantities of goods* to be produced, supplied or acquired;
(4) the *description of goods* to be produced, supplied or acquired;
(5) the *processes of manufacture* to be applied to any goods, or the quantities or descriptions of goods to which any such process is to be applied;
(6) the *persons or classes of persons* to, for or from whom goods are to be supplied or acquired, or any such process applied;
(7) the *areas or places* in or from which goods are to be supplied or acquired, or any such process applied.[29]

It should be noted again that at least two parties to any agreement must accept some one or other of the above restrictions and that, while the restrictions accepted may be identical, they need not be provided they belong to the statutory list.[30]

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[26] *Sed quaere.* Later it will be seen that the parties to a registered agreement must notify the Registrar of its termination (s. 10 (2) ), but the Act does not say that the Registrar must thereupon remove the agreement from the register—the High Court procedure for the removal of particulars (s. 13 (1) ) does not expressly cover this point. In his forthcoming regulations, the Registrar may so provide, but it is hoped that he will not do so. A permanent record of restrictive trade agreements must prove an invaluable source of information for administrators and businessmen themselves as well as their advisors and academic scholars. The termination of an agreement ought simply to be indorsed on it, or, perhaps, a terminated agreement might be removed to a special " dead " section of the register which will still be available for public inspection.

[27] *Sed quaere,* if parties, after notifying their agreement, change their minds before the expiration of the stipulated period for notification?

[28] " Restriction," says the Act, " includes any negative obligation, whether express or implied and whether absolute or not ": s. 6 (3). Now, an obligation positive in form may be negative in substance. It is further difficult for an obligation positive in substance not to involve, on its reverse side, a negative obligation. Moreover, the Act says " includes," not " means." The moves in this kind of semantic gambit will be well known to all lawyers up to the middle game.

[29] s. 6 (1). It should be noted that the provisions of the Act apply to " the construction or carrying out of buildings, structures and other works by contractors, as it applies to the supply of goods ": s. 36 (2).

Clearly, the range of restrictive agreements relating to the production and distribution of goods that now falls to be registered is a very wide one. It includes, for example, collusive tendering,[31] agreements to suppress or possibly slow down the application to the manufacture of goods of any new technical development, pre-auction bidding agreements,[32] agreements to share out the trade in a particular region,[33] agreements not to compete *inter partes*, quota and pooling agreements,[34] and trade association agreements with the object, for instance, of collectively controlling the level of new entrants into a particular trade.[35]

The Act, indeed, makes three extensions to the basic list of restrictive agreements that have to be registered. The first appears designed especially to catch the system of aggregated rebates which might not otherwise fall to be registered because of an absence of any " restriction " accepted by the purchaser.[36] The second extension plugs, in particular, the gap through which a quota and pooling agreement might slip if it did not expressly require the parties to restrict output but only required payments into the pool if production or supply by any party exceeded a certain amount[37]: the restriction in such case might evidently be argued to be implicit but not " accepted." The third extension refers to the trade association present or future which does not by its contractual constitution impose any of the statutory restrictions on its members but simply makes " specific recommendations (whether express or implied)"[38] to its members involving the adoption by them of restrictive practices of the kind enumerated in section 6 (1).

Not all restrictive trade agreements, however, are registrable. There are, to begin with, those agreements which do not embody the necessary restrictions accepted by two or more of the parties, like a bulk buying agreement by a group of retailers where the retailers themselves accept no restrictions, say, about the suppliers with whom they would deal, or like exclusive dealing agreements where the supplier accepts no statutory restriction.

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[30] s. 6 (1).

[31] As in *Jones* v. *North* (1875) L.R. 19 Eq. 426.

[32] Which are supposed to be dealt with, so far as they are between dealers regarding the auction of goods, by the Auctions (Bidding Agreements) Act, 1927; but, see Yamey, " Bidding Agreements at Auctions," Butterworths, *S. African Law Review*, 1955.

[33] As in *Wickens* v. *Evans* (1829) 3 Y. & J. 318; and *Att.-Gen. of Australia* v. *Adelaide S.S. Co., Ltd.* [1913] A.C. 781.

[34] See, *e.g.*, the terms of the agreements in *N. W. Salt Co.* v. *Electrolytic Alkali Co., Ltd.* [1914] A.C. 461; *Evans* v. *Heathcote* [1918] 1 K.B. 418; and *English Hop Growers, Ltd.* v. *Dering* [1928] 2 K.B. 174.

[35] Like the National Federation of Retail Newsagents, Booksellers and Stationers in *Sorrell* v. *Smith* [1925] A.C. 700.

[36] s. 6 (4).

[37] s. 6 (5).

[38] s. 6 (7). *Qu.*: the scope of an implied specific recommendation?

In the second place, the Act itself removes from the scope of its basic provisions twelve different restrictions or restrictive agreements. The first six of these are necessitated by the fact that the restrictions involved are already the subject of other statutory provisions which it is not the purpose of the new Act to supersede. They are: —

(i) restrictive agreements between iron and steel producers approved by the Iron and Steel Board and Board of Trade in accordance with the Iron and Steel Act, 1953 [39];

(ii) agreements constituting or forming part of a scheme for rationalising industry under the Income Tax Act, 1952 [40];

(iii) restrictions relating to patented inventions and registered designs which are governed by the relevant legislation of 1949 [41];

(iv) restrictive agreements made in accordance with regulations approved under the Trade Marks Act, 1938, s. 37 [42];

(v) agreements imposing restrictions on registered user of trade marks under the Trade Marks Act, 1938, s. 28 [43]; and

(vi) restrictive agreements expressly authorised by statute, statutory scheme, order or instrument, like the agricultural marketing schemes.[44]

A constant theme running through the Act is the protection of the export trade, restraint of competition or no restraint of competition. Consequently,

(vii) restrictive agreements relating exclusively to the export trade need not be registered in the general register of restrictive trade agreements.[45]

The next two types of agreement are exempted from the duty to register because the one is aimed at the maintenance of approved technical standards while the other has the effect of encouraging the circulation of technical knowledge, *i.e.*:

(viii) restrictions involving compliance with standards approved by the British Standards Institution [46]; and

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[39] s. 7 (1).
[40] s. 8 (2).
[41] s. 8 (4).
[42] s. 8 (6).
[43] s. 8 (7).
[44] s. 8 (1).
[45] s. 8 (8). Where apart from s. 8 (8) an agreement or term thereof relating to the supply of goods by export would be registrable, it must be registered not with the registrar but with the Board of Trade: s. 31 (1).
[46] s. 7 (3).

(ix) agreements for the exchange of technical information imposing necessary restrictions for the protection of the manufacturer divulging the " know how." [47]

A further exception consists of,

(x) restrictions relating to the employment, non-employment or terms and conditions of employment of any person.[48] This exception removes from the factors of registration all questions of employment and labour relations where these appear as ancillary to, *e.g.*, the supply of goods or the provision of the services of a building contractor. Most importantly, perhaps, the exception preserves undiminished the application of the Fair Wages Resolution of the House of Commons, 1946, in, *e.g.*, contracts between building contractors and the Ministry of Works.

The final pair of excepted agreements involve restrictions, prima facie within the statutory list, which, however, Parliament has considered to be on the whole, like individual resale price maintenance,[49] not sufficiently detrimental to the public interest to require to be justiciable before the new court. They are,

(xi) sole agency agreements,[50] which are thought to rationalise the points of retail and wholesale distribution by and large for the benefit of the consumer; and, finally,

(xii) restrictive terms relating exclusively to the goods supplied or to which a process is applied under the relevant agreement,[51] an exception which is of a general character and (*inter alia*) exempts in any case resale price maintenance agreements from registration.[52]

### *Communication, Free and Forced*

Between the existence of a restrictive agreement and its registration there lies the problem of its communication to the Registrar. The provisions included to overcome this administrative difficulty are somewhat complex.

In the first place, a statutory duty is cast on all parties to restrictive agreements, within the meaning of the Act, to communicate all essential particulars to the Registrar.[53] The duty is a " several " one in the sense that proper compliance by one party discharges all others from this primary obligation.[54] For obvious administrative reasons, the duty to register is being laid on the business and industrial community in stages. The Board of Trade is empowered to promulgate orders stipulating which types of restrictive agreement are to be registered and by when.[55] In the first order, which, at the time of writing, awaits approval by resolution of each House of Parliament,[56] registration is required in the period November 30, 1956, to February 28, 1957, of all agreements containing any of the statutory restrictions listed previously in respect of prices, other terms or conditions and persons or classes of persons. It should be noticed that when particulars have been freely communicated in accordance with the general statutory duty, the Registrar has power, where he deems it expedient, to call for further information by notice either to the communicating party or to any other party to the agreement in question.[57]

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[47] s. 8 (5).

[48] s. 7 (4). Employers' associations for collective bargaining and handling any other labour questions are, of course, excluded since they have nothing to do with the supply, acquisition or manufacture of goods.

[49] See the discussion in Section I, *supra.*

[50] s. 8 (3).

[51] s. 7 (2). *Collective* action of this permitted kind is forestalled by the proviso to s. 7 (2).

[52] Otherwise, such agreements would be registrable where statutory restrictions were accepted under it by at least two parties, registration being independent of validity.

[53] s. 10 (1).

If businessmen default in their duty and fail to give particulars of their agreements within the stipulated period, they thereby commit no criminal or civil offence. The elaborate scheme of sanctions in the Act come to bear on recalcitrants only on the motion of the Registrar; and he can move only on discovery of the uncommunicated agreement, or, to put it more precisely, only if, from some source or other, he has " reasonable cause to believe " that a registrable agreement is not being communicated to him or if he has evidence of such default strong enough to stand up in a court of law. It need not be emphasised, therefore, how important it will be for the Registrar not to neglect the development of a strong investigation branch of the Registry.

Should the Registrar obtain positive evidence of default, then the sanctions available are quite drastic. Application must be made by the Registrar to the High Court,[58] whereupon, if the court is " satisfied " [59] on the evidence that default has been made in furnishing particulars of an agreement which is subject to registration,

(i) it may order any party to the agreement who was named in the Registrar's application to furnish the particulars in question within a fixed time [60]; and

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[54] s. 10 (6).

[55] s. 9 (2), 10 (5).

[56] " The Registration of Restrictive Trading Agreements Order, 1956."

[57] s. 14 (2). Knowingly or recklessly giving false information or wilfully suppressing information required to be furnished are criminal offences: s. 16. Proceedings for an offence may be instituted in England and Wales only with the consent of *either* the D.P.P. *or* the Registrar: s. 17 (1). For N. Ireland, the consent must be that of either the Att.-Gen. for N. Ireland or the Registrar: s. 17 (1). Provision for Scotland is not in this respect included expressly in the Act.

[58] Court of Session in Scotland and the High Court of N. Ireland there.

[59] s. 18 (1).

[60] s. 18 (1) (*b*). The sanction for disobedience to the order would, of course, be imprisonment for contempt.

(ii) if the Registrar already has documents or information relating to the agreement, it may authorise their registration as though they were the entire agreement,[61] thus enabling the Registrar, if he so wishes, to argue the invalidity of the " agreement " so evidenced before the Restrictive Practices Court, to the exclusion apparently of any other relevant particulars of the agreement; and

(iii) if the High Court is " satisfied " that the default was " wilful," it may make an immediate order restraining the parties from performing their agreement or making any new agreement to like effect just as if the agreement had been adjudged by the Restrictive Practices Court to be invalid.[62] Against this order of the High Court, the parties are precluded from appealing on the validity of their agreement to the Restrictive Practices Court for a period of two years.[63]

If the Registrar has merely " reasonable cause to believe " that a registrable agreement exists which has not been notified to him,[64] he may take advantage of certain procedures provided in the Act to probe the suspected parties. He is empowered to give notice to any person who is or may be party to such agreement to furnish the particulars specified in the notice,[65] which is made effective by both criminal and administrative sanctions.

Thus, failure to comply with the notice " without reasonable excuse " is a summary offence.[66] More important still, the Registrar, having given a statutory notice, may apply to the High Court for an order to the person or persons concerned to attend the court and be examined on oath and to bring such documentary information as they possess for which the notice originally asked.[67]

In this way, the Registrar's reasonable suspicion may harden to certainty, and he may then register and proceed to the Restrictive Practices Court on the question of validity, or, assuming " default " to have emerged, to the High Court as described above, with the added possibility of obtaining a two years' restraint order from that court if the default was shown to be wilful.

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[61] s. 18 (1) (*a*).

[62] s. 18 (2).

[63] s. 20 (2) (*b*).

[64] s. 14 (1).

[65] s. 14 (1) (3)—supported again by the criminal sanctions in s. 16 (2) and the power to ask for further particulars in s. 14 (2). The validity of the notice may probably be challenged on the ground that the Registrar did not in fact have " reasonable cause " for his belief, but was merely trying to " fish ": *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66.

[66] s. 16 (1).

[67] s. 15. In all court proceedings, whether before the High Courts, Court of Session or Restrictive Practices Court, both sides are entitled to legal representation. The Registrar's counsel before the Restrictive Practices Court—*quaere* the others—are nominated by the Att.-Gen., the Lord Advocate or the Att.-Gen. for N. Ireland. The other function under the Act of the Law Officers of the Crown is a consultative one on any doubts and difficulties of interpretation the Registrar may encounter in the execution of his duties: s. 1 (3).

### *Interpretation*

All questions of whether an agreement falls to be registered under the Act or whether any particulars of such agreement should be varied or removed from the register are determinable by the High Court [68] (not the Restrictive Practices Court), with appeal on application of either side to the Court of Appeal and thence to the House of Lords in the usual way. While the issue of registrability is *sub judice*, the period fixed for registration is, of course, extended *pro tanto* for the agreement under review.[69]

### *The Register*

The location of the register in the United Kingdom has been determined by the Registrar.[70] The particulars of agreements that must be furnished are the names of the parties together with all the terms of the agreement and not merely those relating to the statutory " restrictions." [71] Variations of agreements must also be communicated; also the determination of the agreement unless an express time-limit was embodied therein.[72] Particulars of agreements " of no substantial economic significance " will, however, be removed: the determination of this politico-economic question is left to the Board of Trade on the representation of the Registrar.[73]

In due course, the Registrar will make regulations governing the procedure and form of furnishing particulars.[74] The register will be open to public inspection [75] save for a secret section which will contain particulars regarded by the Board of Trade as against the public interest to divulge or damaging to the legitimate business interests of any person because the particulars would unfairly reveal information like secret processes of manufacture.[76]

## THE RESTRICTIVE PRACTICES COURT

### *Personnel*

The new court is to be staffed by a joint bench of legally qualified and lay judges. The former will consist of five judges of High Court standing,[77] one of whom will be nominated President of the court.[78] The President will presumably be attached permanently to the court, but not the other four legally qualified judges who will, it seems, be allowed to return to the more general work of the ordinary courts of law, when they feel so disposed. If, however, members of the court are to come to work together as a team of specialised and expert adjudicators of restrictive trading agreements, a rapid turnover in the legally qualified personnel would be most undesirable.

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[68] s. 13 (2) (*i*).
[69] s. 13 (3).
[70] s. 11 (1). The Registry of Restrictive Trading Agreements has been established in Chancery House, Chancery Lane, London, W.C.2.
[71] s. 10 (1).
[72] s. 10 (2).
[73] s. 12 (1).
[74] s. 19.
[75] s. 11 (4).
[76] s. 11 (3). N.B. also, s. 33 (1).

The lay judges of the court, who will be appointed by Her Majesty on the Lord Chancellor's recommendation, will be ten in number,[79] and must be persons " appearing to the Lord Chancellor to be qualified by virtue of . . . knowledge of or experience in industry, commerce or public affairs." [80] They will be appointed for fixed periods of not less than three years and may be re-appointed.[81] Their security of tenure is qualified by the Lord Chancellor's right to remove any lay judge " for inability or misbehaviour, or on the ground of any employment or interest which appears to the Lord Chancellor incompatible with the functions of a member of the court." [82] By written notice to the Lord Chancellor they may resign at any time.[83] For the same reason as that advanced before, it is hoped that a policy of continuity of personnel will be observed also in respect of the lay judges.

### *Work*

The functions to be performed under the Act are so distributed among the various governmental agencies concerned as to enable the Restrictive Practices Court to devote its attention exclusively to the task of applying the criteria of validity, already discussed in the first section of this paper, to agreements brought before it for adjudication.[84] Where an agreement has been adjudged void, then, on application by the Registrar, the court may issue such restraint order against the parties concerned as it feels necessary in order to make the finding of invalidity effective.[85] Some consequences of a restraint order are discussed below.

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[77] Three puisne judges of the High Court, one of the Court of Session and one of the Supreme Court of N. Ireland: s. 3 (1).

[78] s. 2 (2).

[79] s. 2 (2).

[80] s. 4 (1).

[81] s. 4 (2).

[82] s. 4 (2) (*b*).

[83] s. 4 (2) (*a*).

[84] It should be noted that the Registrar may be subject to the directions of the Board of Trade about the *order* in which agreements should be brought before the new court for adjudication: s. 1 (2).

[85] s. 20 (3). *Quaere*: whether a branch of the Registry will " police " the restraint orders?

### *Proceedings*

It is provided that the court may sit in plenary session or in divisions, comprising one of the legally qualified judges as presiding judge, together with at least two other members of the court.[86] Hearings may be public or *in camera*.[87] The court and its divisions have all the powers, rights, privileges and authority of the High Court [88] in respect of its proceedings except the power to order payment of the costs of the winning party.[89] Rules of procedure for the court determined by the Lord Chancellor are now awaited.[90] These may establish (*inter alia*) the nature of the materials that should be laid before the court in order that it may have " all material facts and considerations " on which to found its judgment,[91] and a summary procedure by which the court may save time when dealing with an agreement which, in its terms and circumstances, is " substantially similar " to one on which judgment has previously been passed.[92]

The judgment of the court will be delivered by the presiding judge,[93] and on " questions of law " his opinion, and that of any other legally qualified judges who happen to be sitting on the bench, are to prevail, that is to say, prevail over the opinion of the lay judge or judges,[94] with a right of appeal by the disappointed party to the Court of Appeal and thence to the House of Lords. On " questions of fact " the majority view of the court will prevail and will be final without right of appeal.[95]

Little more than this bare summary of procedural provisions is possible at the time of writing about the proceedings of the new court. Arising out of this summary, however, are four matters that merit a few additional words.

First, if the new court is to have any chance of achieving a judicious balance of the economic advantages embodied in the criteria of validity, it will plainly require to have before it as the data of decision detailed evidence of actual and probable economic consequences of a kind never before seen in a British court of law. The forthcoming rules of procedure will, therefore, be of the utmost interest in so far as they may permit such evidence to be adduced. If they do, then the " Brandeis brief " may be said to be on the point of making its first appearance on the British forensic stage.

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[86] Schedule, paras. 3 and 4.
[87] Schedule, para. 3.
[88] With corresponding powers, etc., in Scotland and N. Ireland. Schedule, para. 10.
[89] Schedule, para. 9.
[90] s. 23 (2).
[91] s. 23 (2) (*a*).
[92] s. 23 (2) (*c*).
[93] Schedule, para. 6.
[94] Schedule, paras. 5 and 7.
[95] *Ibid.*

Secondly, the summary procedure which will, beyond doubt, form part of the Lord Chancellor's rules, clearly envisages the evolution of some kind of a "case law" of restrictive trade agreements. The nature of the court's jurisdiction makes it clear that it will be a very special kind of "case law," consisting of rough aggregates of roughly like cases with the ultimate right nevertheless reserved in all cases of judging purely on the individual merits.

A word next on the doctrine of binding precedent and the new court. The doctrine's application to decisions of the Restrictive Practices Court will, it seems, be similar to its application to decisions of the puisne judges of the High Court: that is to say, it will in a sense not apply. But, the inapplicability of a doctrine of binding precedent does not mean that precedents are not followed. For self-evident reasons they normally are, whether within the High Court or in another system of law which does not recognise the doctrine: it is only that in critical cases freedom is retained to reconsider the direction of case development. So, in the Restrictive Practices Court, and in accordance with the doctrine of precedent, the judgment of a division of the court, or even a plenary session, will not "bind" but will merely "persuade" other divisions, since all the court's divisions are themselves courts of co-ordinate jurisdiction. But, generally speaking, decisions will undoubtedly be followed within the court so as to build up a body of consistent jurisprudence. On "questions of law" the Restrictive Practices Court, like the High Court, will, of course, be bound by the relevant decisions of the Court of Appeal and House of Lords.

Finally, we come to the question which, from a juristic viewpoint, is the most important raised by the new Act. What is a "question of law" in the Act? Or, more specifically, is the application of the criteria of validity by the Restrictive Practices Court a "question of law" or a "question of fact"? The characterisation of issues as ones of "fact" or "law" is, itself, a question of law. Therefore, the opinion of the legally qualified members of the new court will immediately prevail on this vitally important matter and, ultimately, the opinion of the House of Lords.

The reason why the question is vitally important is ~~because~~ that, whatever and however elaborate the technical garb in which it is debated in the House of Lords, the real underlying issue will be simple and fundamental: is the validity of restrictive trade agreements to be determined by the specialist tribunal apparently created by Parliament for this very purpose, or is the last word to be given to the House of Lords, that is to say, to the general courts of law?

The omission from the Act of any clear expression of Parliament's wish in this matter is one of the first magnitude, indicating some pusillanimity in establishing a new administrative régime for the effective control of restrictive trade agreements. At the earliest moment, an authoritative pronouncement of the House of Lords will have to be sought. If, contrary to legal expectations and presumptive canons of interpretation, their Lordships assert the *application* of the criteria of validity to be a " question of fact," its decision will form the corner-stone of a viable system of control. But if their decision goes the other way, then, in the writer's respectful opinion, this new and desirable experiment will be severely impaired at the outset—unless the Court of Appeal and House of Lords consistently follow the Restrictive Practices Court, in which case the administration of the new Act will be affected by no more than a series of unnecessary and rather farcical delays.

## CONSEQUENCES OF INVALIDITY

### *Between the Parties*

When the restrictions in an agreement are found by the Restrictive Practices Court to be contrary to the public interest, the agreement is void in respect of the restrictions in question.[96] The result is, that the agreement is unenforceable as between the parties, assuming that one or any of them no longer want to comply with the agreement. But the fact that the agreement is void does not by itself prevent the parties from continuing to carry it out if they so wish: void agreements in restraint of trade have long ceased to be criminal or prohibited in themselves.[97] Hence, the power given to the new court to make a restraint order against the parties to the invalid agreement. Disobedience to the order will, of course, entail imprisonment for contempt. Thus, once a restraint order has been made against a trade association in respect of its principal collective purposes, the association might as well wind itself up.[97a]

### *Position of Outsiders*

The position of persons not parties to the restrictive trade agreement (or association) who have been injured by the collective acts of the parties *after* the agreement was adjudged void seems quite plain. A successful action for civil conspiracy will lie where the defendants combined to do unlawful acts causing loss to the plaintiff; if, however, no unlawful acts were involved in the injurious activities of the combination, the latter may successfully plead that they were advancing their respective trade interests.[98]

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[96] s. 20 (3). *Quaere*: whether, *before* adjudication, a properly registered agreement which " is deemed to be contrary to the public interest " (s. 21 (1) ), is void for the purpose of all actions in the ordinary courts of law?

[97] See *Anti-Trust Laws* (ed. W. Friedmann, 1956), p. 346.

[97a] The Tobacco Association has done this already, but that association existed principally for the collective enforcement of resale prices, a method of restraining competition made illegal *per se* in the new Act.

On well-established principles, the voidness of the restrictive agreement would not in itself deprive the defendants of their special defence. But they would be defeated if a restraint order had been made against them, so converting their harmful acts into unlawful ones.

In the case of trade association activities, however, the action would have to be brought against the individual members concerned and not the association as such, because the latter, as a " trade union " within the meaning of the Trade Union Acts, 1871–1913,[99] is immune from tort actions,[1] with one exception, namely, under the new Act where the association members had combined to enforce resale prices.[2]

## CONSEQUENCES OF VALIDITY

### *Between the Parties*

In only one respect would the parties find their hands tied if their agreement (or association) were declared valid by the court. They would still be prohibited under section 24 from exerting collective sanctions against any party in breach of a term relating to resale prices. In the case of other terms, however, the full battery of sanctions contained in the agreement might be brought to bear.[3]

It may be added here that, although in theory the jurisdiction of the general courts continues over contracts in restraint of trade involving restrictions dealt with by the new Act, that jurisdiction is unlikely again to be invoked. Where, however, contracts in restraint of trade fall outside the Act,[4] an understanding of the nature of the law of restraint of trade remains essential, and the jurisdiction of the common law courts will remain alive.

### *Position of Outsiders*

In an action for conspiracy, the outsider would now succeed, in general, only if the validated combination had injured him for the purpose of maintaining resale prices. Otherwise, the classic defence of pursuit of trade interests would bar.

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[98] *Ibid.*, pp. 358–359.

[99] See Citrine, *Trade Union Law* (1950), pp. 295 *et seq.*

[1] Trade Disputes Act, 1906, s. 4.

[2] s. 24 (8).

[3] Fining, expelling and stop-listing by domestic tribunals of trade associations may also, of course, continue where the association does not fall within the scope of the Act, *e.g.*, an association of businessmen who provide transport services.

[4] Like in the case of contracts between the providers of services, as in *Hearn* v. *Griffin* (1815) 2 Chit. 407, or *Collins* v. *Locke* (1879) 4 App.Cas. 674.

# THE WHITE PAPER ON LOCAL GOVERNMENT

W. O. HART, C.M.G.

THE long-awaited White Paper [1] setting out the Government's proposals for the reorganisation of local government has at last appeared. It is the purpose of the present article to give an account of these proposals and to offer some comments upon them.

## PRESENT STRUCTURE OF LOCAL GOVERNMENT

The present structure of local government in England and Wales is mainly derived from the Local Government Acts of 1888 and 1894. During the earlier part of the nineteenth century, legislation had reformed the municipal corporations and created an ill-assorted group of *ad hoc* authorities. The process of bringing some order into the resulting disorder was effectively started by the Public Health Acts of 1872 and 1875. The Municipal Corporations Act, 1882, carried this a stage further, so that it could then appear that the urban communities at any rate were relatively well organised for local administration. The rural areas were not as satisfactorily served and the position of the county justices in relation to their administrative functions looked anomalous. Hence the Local Government Act of 1888 was passed, primarily to give democratically elected institutions to the rural counties. But such a change in the form of county administration would bring sharply into question the relations between counties and boroughs, which had not been prominent while each was administered by such different forms of organ as quarter sessions and town councils. In consequence, at the time that county government was being strengthened by the introduction of county councils, the larger municipalities were taken outside the sphere of the administrative county and given the independent status of county boroughs. In this way the contrasting types of local organisation—the one-tier, " all-purpose " county borough of the larger urban areas and the two-tier system of county government—came into being. The completion of the structure was the work of the Local Government Act of 1894, which established the regular second-tier pattern of county districts administered by non-county borough councils or urban or rural district councils and which also introduced the third tier, the parish meeting and parish council for the rural parish. Fundamentally the all-purpose county borough is the prototype of the urban authority—or at any rate is the ideal which urban authorities seek to attain—while the two- or three-tier county system, although primarily rural in conception, ensures some pooling of financial resources as between the smaller but wealthier towns, and larger but poorer agricultural parts of each administrative county.

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* The Author is Clerk of the London County Council. We are asked by him to state that this article represents his own opinions and conclusions for which the L.C.C. accepts no responsibility.

[1] Local Government: Areas and Status of Local Authorities in England and Wales. Cmd. 9831.

The contrast between the independent county borough and the two-tier county system of government developed into a conflict, because every extension of county borough boundaries and every creation of a new county borough robbed the administrative county of what were often its most profitable areas of rateable value on which it relied to maintain services in its unprofitable rural areas. Nor did the system of financial adjustments, which were made on such occasions between the two authorities, adequately compensate for this loss. In extreme cases, such as the West Riding and south Lancashire, the congregation of county boroughs left but an awkward and tattered remnant of the administrative county inconveniently filling in the gaps around and between them. The heat with which the conflict between county borough and county was carried on not only kept the problem in great prominence but also generated passionate loyalties on both sides, which have tended to make difficult a rational approach to the question of reorganising local government. The mechanics and rules governing promotion to county borough status and the extension of county borough boundaries, which were originally framed in the Local Government Act of 1888,[2] were altered by the Local Government (County Boroughs and Adjustments) Act, 1926, the Local Government (Boundary Commission) Act, 1945, and the Local Government Boundary Commission (Dissolution) Act, 1949. As they now stand they prohibit an area with a population of less than 75,000 from becoming a county borough and they require a private Act of Parliament for the creation of a new county borough and for the extension of county borough boundaries, except where there is agreement by all parties, in which case an order of the Minister is effective.[3] No new county borough has been created since 1926.

Though the most prominent, the problem of county borough and county relations was not the only one in the field of local government boundaries. At the lower level of second- and third-tier authorities the Local Government Act, 1929,[4] introduced the principle of periodical reviews undertaken by county councils to provide a means of bringing the boundaries, and hence the size, of county districts under regular consideration. The first review completed shortly before the war had the effect of reducing 1,606 urban and rural districts to 1,048. The second review was postponed because of the war.[5] There are, however, many small authorities still remaining. The White Paper states that there are some 700 county districts with populations of less than 15,000, nearly 500 with less than 10,000 and over 200 with less than 5,000. The resources of such small authorities must be difficult to match with the duties which they ought to be able to discharge.

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[2] s. 54.

[3] Local Government Act, 1933, s. 140, amended by Local Government Boundary Commission (Dissolution) Act, 1949.

One special structural point may be mentioned here in some detail. Local government organisation in those vast aggregations of urban development, which have been given the ugly name of conurbations, has grown up in a haphazard and unco-ordinated way. The supreme example is, of course, the vast built-up area of Greater London where, apart from the peculiar organs administering the central County of London, a collection of county councils, county borough councils and councils of non-county boroughs, urban, and even in part rural districts carry on the functions of local government within boundaries which have often lost any physical distinction. London is a special problem and has never been tackled in the way in which it deserves, but not dissimilar conditions exist in the other large urban settlements. In one, that of Tyneside, the problem was studied by a Royal Commission which reported in 1937.[6] The Commission was not unanimous in its recommendations and the proposal for regional councils supplemented by local borough or district councils, which was made by the majority report, was not accepted; but its consideration of the problem in Tyneside helped to draw attention to the difficulties which can arise in an area of dense development administered by a number of separate local authorities.

### LOCAL GOVERNMENT BOUNDARY COMMISSION

These problems of the structure of local government have been familiar for some time although this has not led to any speedy solution for them. The delays in effecting changes which the war imposed made it seem all the more essential that the boundaries and areas of local authorities should be comprehensively reviewed in the immediate post-war period of reconstruction and, as likely to be the best method of doing this, the Local Government Boundary Commission was established in 1945.[7] This body was charged with the duty of reviewing the circumstances of the areas into which the country was divided for the purposes of local government. Its jurisdiction covered the creation of new county boroughs, the extension of county borough boundaries and even the demotion of county boroughs to non-county borough rank, as well as alterations of counties and alterations of non-county boroughs, urban and rural districts. In addition to its general duty to review the areas of local government, it was required to consider any particular area if directed so to do by the Minister, or if requested by a county council as regards its own area or any of its county districts, by a county borough council as regards its own area, or by the council of a non-county borough with a population of not less than 100,000 claiming promotion to county borough rank.

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[4] ss. 46 and 47; now Local Government Act, 1933, s. 146, amended by Local Government Boundary Commission (Dissolution) Act, 1949.

[5] Local Government Elections and Register of Electors (Temporary Provisions) Act, 1939, s. 6.

[6] Cmd. 5403.

In carrying out its task the Commission, after a preliminary investigation, was to issue a statement setting out the nature of the order it proposed to make. If objection was made, a local inquiry was to be held leading to a final Order of the Commission, which either provided for alteration of the area concerned or decreed that no change should be made. Where the order related to a county or county borough it was subject to special parliamentary procedure.[8] When an order, whether positive or negative, had come into operation, the Commission was prohibited from again considering alteration of the area concerned for a period of ten years, unless there should occur a substantial change in the distribution of population or some other exceptional circumstances.

To assist the Local Government Boundary Commission in its task general principles were prescribed for it by the Minister.[9] The main object was "to ensure individually and collectively effective and convenient units of local administration." In considering whether this end would be achieved the Commission was to have regard to the physical features of the area, its size and shape, its economic and industrial characteristics and its population, building development or expected development, community of interest between different parts, the wishes of its inhabitants, the record of administration of the existing local authorities and the financial resources of the area measured in relation to its financial needs. Except perhaps indirectly in relation to financial needs, this list of considerations which the Commission had to bear in mind did not contain a single reference to the functions which local authorities have to carry out.

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[7] Local Government (Boundary Commission) Act, 1945.

[8] Under the Statutory Orders (Special Procedure) Act, 1945.

[9] Local Government (Boundary Commission) Regulations, 1945, S.R. & O. 1945, no. 1569.

The Commission found this omission fundamental. The structure of local government drew—and still draws—a sharp line between the county borough, administered on a one-tier system by an "all-purpose" authority, and the county, where a two-tier system allots major functions to the county council and minor functions to the county district councils. The Commission suggested that the time had come for introducing a third type of administrative organ, midway between the "all-purpose" county borough and the "minor-purpose" county district, which would provide medium-sized towns with a "most-purpose" authority. The Commission proceeded in their 1947 Report to sketch what the adoption of this third type of authority would mean in a revised pattern of local government. The largest towns would be governed on the one-tier system by their own all-purpose authorities as were the existing county boroughs. The rest of the country would fall within the two-tier system, but the medium-sized towns would rely on the county only for a very limited number of services [10] and would themselves administer a much wider set of functions than were left to county districts.

Besides straying into the field of functions these suggestions could not, on their purely structural side, have been carried out under the powers then vested in the Local Government Boundary Commission. The Commission therefore proposed fresh legislation to carry them into effect. The Government, however, was not prepared to accept any such drastic reorganisation of local government, which it regarded as going well beyond the bounds of the Commission's jurisdiction. As the Commission had in substance indicated that it regarded anything less fundamental as useless, the Government decided to abolish it and this was done by the Local Government Boundary Commission (Dissolution) Act, 1949.

## THE FUNCTIONS OF LOCAL AUTHORITIES

Though the opportunity for root and branch recasting of the structure of local government was thus shelved, the Commission's report had drawn attention to the importance of considering functions in deciding upon "effective and convenient units of local government administration." And the functions administered by local authorities have been subjected themselves to considerable change. Local government services grew in scope and importance steadily throughout the latter part of the nineteenth and the first part of the twentieth centuries.

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[10] The Boundary Commission suggested police, fire services, land drainage, small holdings, vehicle licences, diseases of animals and some parts of town and country planning.

Moreover, this growth was accompanied by the abolition of *ad hoc* authorities and the concentration of services formerly provided by them in the hands of the general local authorities. Thus education in 1902 [11] and public assistance in 1930 [12] were transferred from the school boards and the guardians. But this process was no sooner completed than a contrary tendency began to appear. The quickening of means of communication, together with the growth of new services, began to draw attention to the inappropriateness of areas primarily established for older services, such as poor law or public health, for such modern services as education or town and country planning. The same developments also emphasised the national interest in at least a minimum standard of service being maintained throughout the country, whatever the resources or size of the areas of the administering authorities. These influences have contributed to two changes in local government. First, functions have been removed altogether from local authorities and have been taken over by the State, either directly or through special organs established for the purpose. Even before the war the licensing of passenger service vehicles was transferred to the traffic commissioners,[13] unemployment assistance was transferred to the Unemployment Assistance Board,[14] and trunk roads to the Minister of Transport.[15] Since the war transfers of this kind have been more drastic. Local authorities lost hospitals to the regional hospital boards,[16] some transport undertakings,[17] electricity and gas undertakings,[18] the relief of destitution [19] and valuation for rating.[20] Secondly, there has been a marked tendency for the county councils to grow in importance of function at the expense of the second-tier county district authorities. This started with the Local Government Act of 1929 and has been pursued in the field of education,[21] police,[22] special health services,[23] fire protection [24] and planning.[25] This tendency is to be justified by the greater resources and the more even standard of service which should come from entrusting the powers to the larger, rather than the smaller, authorities. There have been attempts to keep this advantage while countering the complementary disadvantage of remoteness of administrative control by the use of the somewhat awkward and unpopular devices of delegation,[26] or divisional executive administration.[27]

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[11] Education Act, 1902.
[12] Local Government Act, 1929.
[13] Road Traffic Act, 1930.
[14] Unemployment Act, 1934.
[15] Trunk Roads Act, 1936.
[16] National Health Service Act, 1946.
[17] Transport Act, 1947.
[18] Electricity Act, 1947; Gas Act, 1948.
[19] National Assistance Act, 1948.
[20] Local Government Act, 1948.
[21] Education Act, 1944.
[22] Police Act, 1946.
[23] National Health Service Act, 1946.
[24] Fire Services Act, 1947.
[25] Town and Country Planning Act, 1947.

While considering the functions of local government it is worth while referring to an element almost of chance to which the Local Government Boundary Commission drew attention in its final report of 1947.[28] It pointed out that there were then at least six main local government services under the supervision of separate Ministers. Though minor changes have happened, the position is still substantially the same. In spite of its name and the fact that it has absorbed the formerly independent Ministry of Town and Country Planning, the Ministry of Housing and Local Government is in no true sense a real Ministry of Local Government able to view local government as a whole. The various Departments have their own ideas as to the way in which the administration of the local government services, with which each is concerned, should be organised, with the result that there are some strange and apparently arbitrary rules about the local authorities by which a particular service is to be administered. A recent example is in the Food and Drugs Act, 1955 (a consolidating measure),[29] which lays down that " food and drugs authorities " for the purposes of the Act shall be county borough councils, the councils of every non-county borough or urban district with a population according to the last published census of at least 40,000 and the county councils elsewhere. This is, however, supplemented by complicated provisions empowering the Minister of Health to direct (1) that the council of a non-county borough or urban district whose population falls below 40,000 shall continue to be a food and drugs authority so long as its population does not fall below 20,000; (2) that, although the population of a non-county borough or urban district would normally entitle its council to be a food and drugs authority, the county council shall nevertheless continue to be the authority for the borough or urban district.[30]

## FINANCE

In the changes which have been made in the distribution of functions among local authorities the question of the resources which each could call upon has assumed increasing importance as the demand for national standards of service has grown. The key to resources is, of course, finance. The nineteenth century was not so successful in providing local government with a lasting financial basis as it was in recasting its structure. It recognised the need to provide local authorities with a new source of revenue which could grow as the national economy expanded and local government services might be expected to extend. But the attempt to give a reasonable degree of financial autonomy by the system of assigned revenues, introduced by the Local Government Act of 1888, gradually broke down. In place of a competence of its own, capable of growing with the growth in prosperity of the country, local government was thrown back upon central grants in aid as the necessary supplement to the rates. The latter are universally admitted to be an unsatisfactory tax, regressive in operation and incapable of great expansion; but though claiming no moral merit for themselves, rates are able to show a superiority over all other suggested forms of local taxation in that they automatically indicate from which area they are derived.

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[26] *e.g.*, Town and Country Planning Act, 1947, s. 34.

[27] Education Act, 1944, s. 6, and Sched. 1, Part III.

[28] Para. 7.

[29] s. 83.

[30] Parallel examples may be found in Local Government Act, 1929, ss. 32 and 33 (highways); Education Act, 1944, s. 6 and Sched. 1, Part III (excepted districts); Police Act, 1946, ss. 1, 4 and 17 (police).

Grants in aid are another matter. They present the difficult question of distribution—in accordance with what formula shall their recipients be chosen and their amounts determined? Though in this respect there is a difference between percentage grants, settled merely by the expenditure of the aided authority on a particular service, and block grants, determined by some formula based on need and wholly free from any form of earmarking to particular services, both in varying degrees inevitably affect the relationship between central Government and local authorities who are no longer able to stand on their own financial feet. With the growth in the cost of services the proportion of local authorities' expenditure which is derived from grants in aid has risen to a substantial level, and the desire for a national standard of service has encouraged further the attitude of mind towards local authorities which sees them as little more than local agents charged with carrying out the directions of a central Ministry on which rests the principal responsibility for the service.[31] A healthy and vigorous system of true local government cannot flourish if it is in this way subordinated to central Government control and direction.

The problems of local government reorganisation which were left unsolved when the Local Government Boundary Commission was dissolved in 1949 fall broadly under the three heads of structure, functions and finance. Structure covers a wide field: though the most obvious manifestation of the need to deal with it arises from the conflict between county borough and county administration, more fundamental issues are at stake. What system of local government is best, a one-tier, or a two-tier, or a combination of both as at present? What are the best areas for the administration of local government services? Would the conurbations need special treatment?

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[31] *Cf.* Education Act, 1944, s. 1.

The functions of local government need reconsideration: both the wide question of what functions local authorities ought to administer and the narrow one of how those functions should be divided among the different types of local authority. And in this reconsideration not the least question is the kind and degree of control which should be exercised by the central Government Departments over local authorities in the exercise of their powers and duties.

The financial problem is to find some way of providing local authorities with their own adequate sources of revenue which will ensure that they are neither handicapped for lack of resources, nor compelled to make excessive use of an unfair form of tax, nor placed in a financial relationship with the central Government in which it is hard to maintain reasonable autonomy. Autonomy is an important conception in this matter because underlying the whole question of local government reorganisation is the principal objective of retaining and, indeed, re-creating a healthy and true local self-government, not too remote from the people to lack popular interest and support, nor too small and poor to be capable of efficient service.

## THE WHITE PAPER PROPOSALS

Discussion and, indeed, negotiation about reorganisation have been going on for some years, the protagonists of the county borough one-tier system maintaining its value and suitability for extension, while on the other hand the supporters of the two-tier county system sought its enlargement. In these conditions the fact that the Minister of Housing and Local Government was able to achieve such a measure of agreement as is set out in the Appendix to the White Paper is a striking result.

All the same, the White Paper does not attempt to deal with either the functions or the finance of local government. Possible redistribution of certain functions between county and district councils and an examination of local authority finance are, it is stated, being undertaken separately and the Government's conclusions will be announced in due course. The White Paper is confined therefore to the general structure of local government in England and Wales (excluding, however, London) and in particular with arrangements for reviewing and altering local authority areas and status.

In the Government's view the present system of local government, though many changes have occurred since it was established, has not broken down and has not shown itself as in need of radical reshaping, but rather of improvements needed to make it fit modern conditions.

With this premise and excluding consideration of functions and finance (which are being separately discussed), the White Paper concludes that there are five main problems, which are:

1. creation of new county boroughs;
2. extension of existing county boroughs;
3. revision of county areas;
4. revision of county district areas; and
5. organisation of the conurbations.

To solve four of these (that is, all except (4), the revision of county district areas) the White Paper proposes the establishment of two Local Government Commissions, one for England and one for Wales. They will submit reports and recommendations to the Minister. After publication of these, the Minister will give effect to them, with such modifications as he thinks desirable, in the form of orders submitted to Parliament. In general each order will cover a substantial area so that the changes it proposes can be comprehensively considered. When an order has come into effect no changes in the pattern it establishes in the area concerned will be permitted for a period of years.

At the lower level outside the conurbations the revision of county district areas will be carried out by the existing machinery of periodical reviews undertaken by county councils and given effect to by Ministerial order, though the Minister will be empowered to refer any case to the appropriate Local Government Commission where he is dissatisfied with the county council's proposals.

So much for machinery: but the White Paper also attempts to lay down certain guiding principles. As a broad objective the Government reverts to the instruction given to the dissolved Local Government Boundary Commission: " to ensure individually and collectively effective and convenient units of local government administration." Within this general aim the White Paper proposes some more detailed considerations. Candidates for promotion to county borough rank must have a population of at least 100,000, or 125,000 in a conurbation, in place of the present minimum of 75,000. In considering claims for promotion the Commissions must also take into account the resources and administrative record of the claimant and the consequences likely to result to the county. Where extension of boundaries is in issue expansion must be shown to be justified and not to be excessive and the claimant must show that the advantages gained will outweigh the disadvantages for the county affected. Increasing the lower limit of population for county borough status raises the question of demotion for those present county boroughs now falling short of the new minimum. The White Paper regards such a step as exceptional and undesirable save where an authority is unable to discharge its responsibilities effectively, though it does not altogether rule it out. Where such a proposal is made, it would be presented to Parliament in a separate order so that it could be considered in isolation.

The White Paper has little to say about the revision of county areas except to recognise that some corrections could conveniently be made, and that creation or extension of county boroughs might leave the remnant of an existing county incapable of efficient life as a separate entity. Where, however, amalgamation or transfer of substantial parts of a county may be proposed by the Commissions, separate orders would be submitted to Parliament.

The White Paper has much to say about the conurbations, though in this matter it is perhaps at its most tentative. It leaves still to be defined what are the conurbations needing special treatment, and is content to set out possible methods of improving local administration within a conurbation. One method would be to reduce the number of existing local authorities by amalgamations and expansions, but substantially to leave the present system, or lack of system, untouched. Alternatively, the area might be reorganised into a group of county boroughs. In either case there would remain services needing to be co-ordinated or administered in common for the whole conurbation, and for this purpose a regional authority, whether directly or indirectly elected, might be needed. The White Paper envisages the possibility of different solutions being appropriate for the different conurbations.

When, however, it comes to the biggest conurbation of all, Greater London, the White Paper begins by excluding the County of London, because it has a special system of local government, and proceeds to forbid the creation of any county boroughs in Middlesex, because otherwise that county would virtually cease to exist. The normal county review of district areas in Middlesex is to be undertaken by the Local Government Commission, which is also to consider the desirability of further delegation or transfer of functions. Elsewhere in Greater London the Commission is to be free to make recommendations as for any other conurbation, and will have to consider " whether there are matters which should or could be handled jointly on behalf of Greater London as a whole "—a somewhat ambiguous remark in view of the earlier statement that " none of the present proposals . . . applies to the structure of local government within the County of London."

When it comes to the reviews of county districts outside the conurbations, the White Paper lays down that county councils, who will undertake them, should be ready to recommend whatever changes may be needed to secure administrative units with adequate population and resources: the smallest districts should be eliminated. In doing this they must be free to treat non-county boroughs as if they were not in the protected position which the law at present assures them. But even so their privileged status is to be preserved to the extent of requiring the Minister's specific approval, after holding an inquiry, before a non-county borough loses its status, and wherever possible provision is to be made to retain the identity and dignities of a borough even though it may be necessary to merge it in some physically larger county district.

Finally, at the third-tier level, county reviews are to consider parish boundaries with a view to ensuring that in each parish there may be, wherever possible, a parish council.

## CRITICISM OF THE PROPOSALS

What is to be said of this latest attempt to solve, or at least to prepare the way for solving, the problem of local government reorganisation? The first quick impression is that the White Paper merely undoes the work of the Local Government Boundary Commission (Dissolution) Act, 1949. Two Commissions are to be established, with substantially, as far as can be seen, the same mandate as the dissolved Boundary Commission. Nor, indeed, have the " guiding principles " made much advance in defining what it is that needs to be done and how it is to be carried out. True, the problem of the conurbations has been recognised to need special attention and perhaps special treatment. A little more boldness in dealing with the county borough problem is also apparent. But there the matter seems to stop, and there appears to be no disposition to think, apart perhaps from the conurbations, of anything in the way of the " most-purpose " authority which the dissolved Boundary Commission thought necessary. There is to be no reorganisation of local government: as its title implies the White Paper goes no further than to deal with arrangements for reviewing and altering local authority areas and status.

Indeed it could hardly be otherwise. Though " the Government naturally do not take the view that no changes should be proposed to Parliament except with the agreement of the local authorities," yet " their willing co-operation can be of great value in carrying through any reorganisation." The county borough issue has ranged them in two camps and the discussions leading to the White Paper appear to have been mainly concerned in reaching some compromise between their opposing views. Committed to defend the merits of one or other system of local administrative organisation, the local authority associations were not likely to contemplate some entirely novel system, but rather to think solely in terms of the present organs. And, apart from the possible new regional authority to co-ordinate or administer common services in a conurbation, there is no hint of anything but the alteration of areas and the creation or demotion of existing types of local authority.

It may be thought that the conflict over county borough status has too strongly influenced the proposals of the White Paper, both because, as has been suggested, it seems to have dominated the discussions to the exclusion of any real reorganisation, and also because its solution has obviously taken up a disproportionate part of the proposals themselves. It is *the* problem of local government organisation if that organisation is not to be altered, but to treat it as the main problem requiring solution is to rule out at the start any question of real reorganisation.

It may be this preoccupation with the county borough conflict which is also responsible for confining the White Paper to dealing with structure to the exclusion of functions and finance. Unless, apart from the conurbations, all that is hoped for is the settlement of those claims for county borough status or extension which have been accumulating for some years together with a " tougher " county review to eliminate small county districts, it is difficult to see how the new Commissions are likely to be able to get much further than the dissolved Boundary Commission, when consideration of function and finance is excluded. Indeed it is hard to see how they can carry out even their limited mandate until, at any rate, the separate discussions about functions are concluded, and in this sense the White Paper may be no more than a first instalment of proposals which cannot be complete—nor completely judged—until the other current discussions are finished.

In relation to the conurbations the element of compromise appears most strongly: the issue, while recognised to exist, is in effect shelved for further thought by the Commissions who are given little encouragement to think of much beyond the use of the existing types of authority. In the case of London it looks as if any opportunity to meet its real problems is once more to be ignored.

The underlying *malaise* of local government is that local authorities have been losing powers and hence influence, have been forced more and more into financial dependence on central Government and have come more and more under central control. In consequence local government has offered less scope and therefore has had less attraction for men and women of the calibre desired in public life, whether as members or officers. To revivify local government recent tendencies must be reversed, it must be given more responsibility, both in the range of services it administers and in its freedom to administer them with a reasonable degree of autonomy. A close dependence upon popular support is important on the one hand and a reasonable standard of service and efficiency is essential on the other hand. As the agreed statement of the local authority associations states: " The aim should be to secure that all functions are exercised at the lowest administrative level consistent with efficiency and economy." But there is no hint of further functions for local government nor any suggestion, apart from the conurbations and the small county districts, that areas should be examined in relation to the functions for which they are to be used. The present hybrid system of joint bodies and delegation of powers seems likely to remain as being a necessary result of continuing to administer the services of the twentieth century through the local authorities intended for the services of the nineteenth century.

The White Paper is not in reality a White Paper on local government reorganisation. As it says, it is concerned with the far narrower task of overhauling and making some improvements in the structure of the existing system. It may well be that this is a necessary first step, that until the controversy engendered by the issue of county borough status has been given a chance to be forgotten, true reorganisation cannot usefully be considered. If this is so it must be hoped that the White Paper will show the way to bury this hatchet and that in due course the local authority associations and the Ministry may have so far forgotten its existence as to be able to face the real issues of local government reorganisation.

# THE PAKISTAN CONSTITUTION

Alan Gledhill

Though India took less than two and a half years after independence to evolve her new constitution, the same task has taken Pakistan nearly nine years. In India the Government of India Act of 1935 proved a satisfactory basis for the new constitution; provisions savouring of foreign control and discretionary rule were eliminated, the central power was enhanced, emergency powers were subjected to parliamentary control, the preamble, the fundamental rights, and the directive principles were added, and there were minor alterations. The resulting constitution has been in operation since 1950 and appears to have proved acceptable to the vast majority of the people of India.

But Pakistan had to determine the precise implications of being an Islamic State; the units of the new State had to be delimited, and the distribution of powers reconsidered. The solution of these problems was impeded by the urgent necessity of setting up a new capital, a new central government and secretariat, by difficulties in intercommunication between the two parts of the country, by conflicts between these two parts, by conflicts between the centre and the provinces, by the emergence of new political parties, and by factionalism within the Muslim League.

In 1949 the Constituent Assembly produced the Objectives Resolution, now substantially reproduced in the preamble to the constitution. This contemplated a federal democratic State in which Muslims might live in accord with the teachings of Islam, though the rights of minorities were to be safeguarded. In 1952 a draft report on fundamental rights, adapted from the Indian version, appeared, and the Basic Principles Committee produced a draft constitution, based, to a considerable extent, on the Government of India Act of 1935. It retained separate electorates for minorities, provided for equal representation at the centre, despite inequality in population, between the two wings of the country, required the laws to be brought into conformity with the principles of Islam, and proposed that this should be done with the aid of a nominated board of experts in the Sharia, who would advise on the repugnancy of new legislation to Islamic principles.

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* The Author is Professor of Oriental Laws in the University of London.

While this constitution was before the Constituent Assembly, it became evident that it provoked dissatisfaction among a substantial number of citizens. Minorities contended that the guarantees of their rights had been violated. The Islamic provisions were criticised on the one hand as inadequate, and on the other hand as being insuperable obstacles to effective legislation. It was said that the draft constitution was undemocratic and that there was excessive concentration of power at the centre. Nevertheless, apart from concessions on the avoidance of laws as un-Islamic, proposed amendments were voted down in the Assembly. In September, 1954, the Constituent Assembly amended the provisional constitution so as to bring the central executive under its control. The Assembly was shortly afterwards dissolved by the Governor-General. Protracted litigation eventually confirmed the legality of this course, and of the summoning of a new Constituent Assembly,[1] so that the task of constitution-making could be resumed. Public opinion generally seems to have approved what was done.

Before the resumption of work on the constitution, a solution was found for one of Pakistan's major problems, when the new Constituent Assembly passed the Establishment of West Pakistan Act, which came into force on October 14, 1955, integrating the western provinces and states into the single province of West Pakistan.

The new constitution Bill was published on January 8, 1956, and it was passed on February 17. It came into force on March 23. The Constituent Assembly made many amendments, not exclusively in matters of detail.

The preamble, like that in the Indian Constitution, makes the constitution a grant of powers by the people, but it recites that sovereignty belongs to Allah Almighty alone, that the people's authority is a sacred trust from Him, and can only be exercised within the limits He has prescribed.

Pakistan is an Islamic republic within the Commonwealth, in which legislative and executive power are distributed between the centre and the two provinces on federal principles. There has been some enhancement of provincial power. There is no distribution of judicial power. The centre and the provinces have parliamentary executives and unicameral legislatures, the franchise being granted to all citizens who have attained twenty-one years. To the provisions for the extension of central power into the provincial field to meet a general emergency, and the suspension of a provincial constitution for misgovernment, has been added a provision, comparable to India's, for central control of finance in emergencies.

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[1] *Reference by the Governor-General*, P.L.D. [1955] F.C. 435.

## DISTRIBUTION OF LEGISLATIVE POWER

The scheme of distribution of legislative power in the Constitution Act of 1935 is maintained, but the provincial power has been enhanced, partly by transfer of powers from the federal list to the concurrent and provincial lists, and partly by the allotment of powers not mentioned on any list to the provinces. The Indian Constitution allots this residuary power to the Union. Though it might be urged that in Pakistan the provincial list, and in India the union list, are no longer necessary, their retention has the advantage of preserving the case law on distribution of powers which has accumulated since 1937. Though a federal law cannot be impugned for extra-territoriality, a provincial law having such operation will be void unless there is sufficient connection between its subject-matter and the territory of the province.[2] The items on the lists are to be liberally construed, so as to embrace all necessary ancillary matters.[3] The pith and substance rule determines the characterisation of an impugned law, and incidental trenching on the sphere of the other legislature is allowed.[4] A construction in favour of validity is chosen where possible. Though the powers on the federal list take precedence over those on the concurrent list, and powers on the concurrent list over those on the provincial list,[5] if a law is apparently an exercise of powers on two different lists, the courts will endeavour to resist its avoidance under this rule, by construing the relevant items on the lists so as to avoid overlapping, for instance by holding the more general power as subject to an exception in favour of the more particular power.[6] In a conflict between provisions in federal and provincial legislation on a matter on the concurrent list, the provincial legislation must give way, unless it has been reserved for and received the assent of the President, but this will not prevent the federal legislature subsequently amending or repealing the provincial law.

Legislative powers with respect to defence, foreign affairs, citizenship, inter-provincial and foreign trade, currency, air navigation, shipping (except coastal shipping confined to one province), major ports, corporations, insurance and banking (except co-operative societies, universities, and corporations and banks operating only in one province), posts and telecommunications, mineral oil, and industries owned by the federation are among the items on the federal list. Items on the concurrent list include civil and criminal law, dangerous drugs, presses and publications, banking, insurance, and corporations, when activity is confined to one province, price control, monopolies, economic and social planning, trade unions, labour, and social insurance. Whereas arms and explosives were formerly within the exclusive federal power, their manufacture remains on the federal list, but all other matters in relation to them are on the concurrent list. Inter-provincial migration, minerals other than oil, formerly within the exclusive federal power, are now on the concurrent list. All matters governed by the personal law are on the concurrent list, except succession to agricultural land, which remains on the provincial list. India transferred this to the concurrent list, in anticipation of the codification of the Hindu law, having regard to the fate of the Hindu Women's Rights to Property Act of 1937. This was a central statute which gave the Hindu widow a son's share in her deceased husband's separate estate, but it was held not to apply to agricultural land, in which the widow got no share.[7] It is most unlikely that Pakistan will contemplate legislation affecting Muslims comparable to the Hindu Code, but the inconvenience of having one rule for devolution of agricultural land and different rules for other property was evident after the enactment of the Shariat Act of 1937 and the Cutchi Memons Act of 1938.

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[2] *Wallace Bros.* v. *I. T. Commissioner* [1948] 75 L.R.Ind.App. at 100.
[3] *Khuro* v. *Pakistan*, P.L.D. [1950] Sind. 49.
[4] *Md. Ali* v. *Crown*, P.L.D. [1950] F.C. 1.
[5] *Md. Ali* v. *Crown*, P.L.D. [1950] F.C. 1.
[6] *G.G.* v. *Madras* [1945] 72 L.R.Ind.App. 91.

The residuary power being with the provinces, it would be otiose to summarise the items on the provincial list, but the enhancement of the provincial power is indicated by the transfer from the federal list to the provincial list of libraries and museums, scientific surveys, opium, salt, lotteries, coastal shipping confined to a province, and navigation on tidal waters, and by the transfer from the concurrent list of prevention of spread of disease, shipping on inland waterways, mechanical vehicles, electricity, and professions other than legal and medical.

Though railways are now on the provincial list, they remain within the federal power until federal legislation has made provision for their transfer to the provinces. Though broadcasting is a federal matter, a province may set up its own transmitters, and is entitled to a share of the fees charged for receiving licences.

## DISTRIBUTION OF EXECUTIVE POWER

The executive power of a province covers matters within its exclusive legislative power, and matters on the concurrent list, but federal legislation on concurrent subjects may exclude the provincial executive power in relation to it.

The federal government may also give directions to ensure compliance with federal legislation and existing laws in force in a province, and to prevent action prejudicial to the exercise of the federal executive power. Directions may also be given to construct and maintain communications which the federal government regards as of natural or military importance, to take measures to protect railways, and to prevent grave danger to the peace and economic life of any part of Pakistan.

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[7] *Re Hindu Women's Rights to Property Act*, A.I.R. [1941] F.C. 72.

As the instrumentalities of the federal government are limited, there are provisions for the delegation of federal functions to provincial governments and their officials.

But the federal government must reimburse the provincial government for the expenditure involved in complying with directions, in so far as it exceeds what would be incurred in the normal discharge of its duties, and for the expense incurred in performing delegated federal functions. The Indian Constitution provides for settlement of a dispute as to the amount payable by arbitration. In Pakistan such disputes are prima facie within the original jurisdiction of the Supreme Court, which could, it would seem, be excluded by an arbitration agreement.

It would also seem that a suit would lie on the original side of the Supreme Court for a declaration that a particular direction to a province was *ultra vires*, though the court would not go into the question of its expediency.

## DISTRIBUTION OF FINANCE

Customs duties, export duties, excise duties (except on liquor and narcotics), income tax (except on agricultural income), purchase tax, terminal taxes and taxes on fares and freight on passengers and goods carried by sea or air, as well as taxes on mineral oil are imposed by the federal legislature; so also are estate and succession duty and taxes on capital values (except in respect of agricultural land). The remaining taxes are imposed by provincial legislatures; land revenue thus remains the main contribution to the provincial consolidated fund. Purchase tax, which was a provincial tax under the Constitution Act of 1935, was, in Pakistan, transferred to the federal list soon after independence, for it transpired that the distribution of finance made in 1935 was unworkable in Pakistan. The scheme of distribution assumes that some provinces will require grants, and that all will be allotted shares in the net proceeds of some taxes imposed by the centre. Before independence, the shares were fixed by Order in Council.

In India the distributable taxes are specified in the constitution, and the shares are determined, in respect of some taxes by the President, in respect of others by Parliament, after considering the report of a Finance Commission, appointed by the President. In

Pakistan, though income tax and purchase tax are distributable, the President may specify other taxes. The distribution is made by the Finance Commission, which consists of the Finance Ministers of the Federation and provinces, and other members appointed by the President after consulting the provincial governors. Though the Indian system is more rigid, whether the Pakistan Finance Commission will find it easy to reach agreement remains to be seen.

Federal property and revenue are exempt from provincial taxation, and provincial property and revenues from federal taxation, but a federal law may impose taxation on the premises occupied by, and the income accruing from a trade or business carried on by a provincial government outside the province.

No provincial law may restrict inter-provincial movement of goods, nor impose an impost on goods discriminating between those imported into and those produced in a province.

## THE FEDERAL EXECUTIVE

The President is selected by the members of the National Assembly and the provincial assemblies. If there are more than two candidates, and no candidate gets a majority of the votes cast, the candidate with the least votes is eliminated, and a fresh ballot is taken, this process being repeated until one candidate secures a majority of votes. The President must be a Muslim, not less than forty years of age, and qualified for election to the National Assembly. His term of office is for five years, and he may not be elected for more than two terms. He may resign, and he may be removed by impeachment for gross misconduct or violation of the constitution, on a resolution passed by three-fourths of the members of the National Assembly.

There is no Vice-President; in the absence or incapacity of the President, the Speaker of the National Assembly acts as *locum tenens*.

The President, in his discretion, selects as Prime Minister the person he deems as most likely to command the confidence of a majority in the National Assembly, and may not remove him unless he is satisfied that he has forfeited that confidence. Other Ministers are appointed and removed by the President. Except in so far as he is empowered to act in his discretion, the President must act on the advice of the Cabinet. In the Indian Constitution, there is no reference to the President's discretion, nor is there a specific declaration that he must act on the advice of his Cabinet; he is obliged to appoint the other Ministers on the advice of the Prime Minister. As in India, a Minister who for six consecutive months is not a member of the central legislature ceases to hold office, but in India the continuance in office of a Minister unable to find a constituency can be secured, because a limited number of members of the legislature can be nominated.

The Cabinet is collectively responsible to the National Assembly. The Prime Minister is obliged to keep the President informed of the Cabinet's executive decisions and legislative programme, to furnish such further information as the President may require, and, if so required by the President, to submit a decision of an individual Minister for consideration by the whole Cabinet. The Attorney-General is not a member of the Cabinet, but a salaried official appointed by the President, and holding office at his pleasure.

## PARLIAMENT

The Parliament of Pakistan consists of the President and a single chamber, the National Assembly, with one hundred and fifty elected members from each province. In addition, for the first ten years, there will be five women members from each province. (The conservative Muslim view is that there is no place for women in politics.) Parliament may alter the total membership, but not so as to disturb the equality of representation between the two provinces.

A candidate for election to the Assembly must be twenty-five, and qualified for registration as an elector. No person may be a member of the National Assembly and a provincial assembly.

The Assembly has a normal life of five years; there must be two sessions a year, one at Dacca; the interval between sessions must not exceed six months; if a Prime Minister is appointed while it is prorogued, the Assembly must be summoned within two months.

The Speaker and Deputy Speaker are elected by the Assembly, and must be members of it. Like other members, they may resign; they may be removed by a resolution of a majority of all members passed after fourteen days' notice. All Ministers and the Attorney-General may speak in the Assembly, but may not vote unless they are members. The President may address and send messages to the Assembly.

A money Bill, defined substantially as in Britain and India, and a Bill or amendment which contains a provision coming within the definition of a money Bill may not be introduced or moved save with the President's recommendation. The budget is presented at his instance. The Assembly may discuss but not vote expenditure charged on the Consolidated Fund, which includes the remuneration and administrative expenses of the President, the judges of the Supreme Court, the Federal Public Services Commission, the Comptroller and Auditor-General, the Speaker, and the delimitation Commission, debt charges, and sums required to meet judgments against the Federation.

Demands for grants to meet anticipated government expenditure in the forthcoming financial year may be assented to, reduced, or refused, but they cannot be supplemented or enhanced.

A decision in the Assembly is by a majority of those present and voting; it is valid notwithstanding the participation of a person not entitled to vote. A quorum is forty, but, differing from the Indian rule, business proceeds until the Speaker's attention is called to a deficiency.

No legal liability arises from anything said or any vote given in the Assembly, nor from the publication of any report or proceedings authorised by the Assembly.

A Bill passed by the Assembly must be presented to the President, who, within ninety days, must give or withhold consent, or, unless it is a money Bill, return it for reconsideration. If assent is withheld, and the Bill is again passed by a majority of two-thirds of those present and voting, the President must give his assent. He must also assent to a Bill returned for reconsideration, if it is subsequently passed by a majority of all members.

Apart from the constitutional provisions outlined above, the Assembly frames its own rules of procedure. The privileges of the Assembly and its members will be laid down in an Act of Parliament.

The President may, in an emergency, if the Assembly is not in session, legislate by ordinance, subject to the same restrictions as to legislative power as bind Parliament. The ordinance must be laid before the Assembly, and will cease to operate six weeks after it meets, or earlier if a resolution disapproving it is passed. The President may also authorise expenditure from the consolidated fund but the Assembly must ratify this within six weeks of its meeting, following the usual procedure for grants and appropriations.

## THE PROVINCIAL EXECUTIVE AND LEGISLATURE

The provisions regarding the federal executive and legislature summarised above are, with adaptations, reproduced when defining the constitution and powers of the provincial organs, so that it is only necessary to indicate the few less obvious differences.

The Governor need not be a Muslim, but he must be a citizen of Pakistan, and forty years of age. He is appointed by and holds office at the pleasure of the President; he may resign; unless he vacates office earlier, he holds office for five years. Corresponding to the Prime Minister at the centre, there is a Chief Minister in the province, and an Advocate-General, comparable to the Attorney-General.

The provincial legislature consists of the Governor and a single chamber, the provincial assembly, which has three hundred members;

this number may be altered by Parliament, but the number of members in the two assemblies must remain equal. For the first ten years, there will be ten additional seats for women, and until October 14, 1965, the tenth anniversary of the creation of the province of West Pakistan, the number of members from constituencies in what was formerly the province of West Punjab must not exceed two-fifths of the total membership of the West Pakistan Assembly. No one may be a member of both Assemblies.

The remuneration and administrative expenses of the Governor, the judges of the High Court, the members of the provincial services commission, and the Speaker and Deputy-Speaker of the Assembly, are charged on the provincial consolidated fund.

Among the provisions dealing with the presentation of Bills for the Governor's assent, in addition to provisions similar to those governing the action of the President in relation to parliamentary Bills, there is a further provision for reservation of Bills for the consideration of the President, who must, within ninety days, give or withhold consent. There is no provision, as in India, for the return of such Bills for reconsideration.

The Governor's power of legislation by ordinance is also similar to the President's, with one exception; the Governor must obtain the assent of the President before promulgating an ordinance which, had it been an Act, would have been invalid without the assent of the President. The object is to ensure the validity of an ordinance on a matter on the concurrent list which is repugnant to an Act of Parliament or an existing law on the same subject.

## Elections

Instead of deciding the vexed question whether to have communal representation with general and special constituencies, the Constituent Assembly has been content to use new terminology and leave the question of joint or separate electorates to be decided by Parliament, after taking into consideration the views of the provincial Assemblies. Normally communal representation is reluctantly conceded to a clamant minority, with little hope that inter-communal relations will improve, and with the dreary apprehension that unco-operative opposition is being perpetuated. Pakistan minorities generally are opposed to separate electorates, but the conservative Muslim opinion is that non-Muslims (including, in their view, the Ahmadiyas, a sect of comparatively recent origin, but already noteworthy for its cohesion, missionary activity, and enterprise) should be allowed to hold no important public office in an Islamic State. It has been suggested that the object in endeavouring to impose separate representation on minorities is to brand them as second-class citizens.

Parliament must legislate on the delimitation of constituencies, the preparation of electoral rolls, conduct of elections, and election offences, but such legislation must satisfy certain conditions laid down in the Constitution.

The delimitation of constituencies must be performed by a commission, consisting of a chairman, who is or was a High Court judge, and two other members who are not members of any legislature; they are appointed by the President in his discretion. In India delimitation of constituencies is done after each decennial census by such authority as the House of the People appoints.

Electoral rolls must be prepared, and elections arranged and conducted, by an election commission. The chief election commissioner is appointed for five years, and is eligible for a second term, but not for any other public appointment. There are as many other commissioners as the President deems necessary, appointed for five years, and eligible for a second term or for appointment as chief commissioner, but no other appointment. These appointments are made by the President in his discretion. The chief commissioner can only be removed on the same grounds and in the same way as a High Court judge, but the President may remove other commissioners in his discretion, after consulting the chief commissioner. A general election must be held within six months of the dissolution of an Assembly, and by-elections within three months of a vacancy occurring. Election petitions lie only to authorities prescribed by Parliament.

No person can be enrolled as an elector unless he is a citizen of Pakistan, has attained the age of twenty-one on, and has been resident within the constituency for six months before, the first day of January in the year in which the electoral roll is prepared; he must not have been declared of unsound mind by a court, nor be subject to any disqualification imposed by Act of Parliament.

## Emergency Provisions

The President of India may issue a proclamation of emergency, if satisfied that a grave emergency, arising from the threat of external aggression or internal disturbance threatens the security of any part of the country. In Pakistan a threat to economic life will also justify the proclamation, but the internal disturbance must be beyond the provincial government's power of control. In both countries, the proclamation requires parliamentary approval. In India, it remains in force for two months in any case, and if the House of the People is dissolved, a resolution of the Council of States will keep it alive until thirty days after the new House of the People meets. The Pakistan

Constitution requires the proclamation to be laid before the National Assembly as soon as possible; if it is not approved, it ceases to operate forthwith. In both countries, if approved, the proclamation remains in force until withdrawn.

In both countries, the effect of the proclamation is to enable Parliament to legislate on matters within the power of the unit, and to empower the centre to give directions to the unit governments as to how their executive power is to be exercised, but in Pakistan it has the additional result of empowering the President, personally, or by the Governor acting as his agent, to assume the functions of any provincial executive authority. In India the fundamental rights of freedom of speech, assembly, association, movement, residence, and freedom to deal with property and follow an avocation are automatically suspended; the President may issue a further order suspending the right to move the courts for the protection of any fundamental right. Only the latter of these two provisions appears in the Pakistan Constitution.

In Pakistan the President may, if satisfied on a report from the Governor that a provincial government cannot be carried on in accordance with the constitution, issue a proclamation suspending the provincial constitution, but in India such a report is not essential, and failure to comply with an executive direction from the centre is sufficient ground for the issue of a proclamation. In both countries the proclamation ceases to operate after two months unless it receives parliamentary approval; in India, if so approved, it remains in force for six months, but subsequent resolutions may revive it for six months at a time, up to a total period of three years; in Pakistan no such proclamation may remain in force longer than six months. Up to date this power has not been abused in India; the delinquent State has been placed under the control of an administrator, who has removed the more obvious results of local misgovernment, ordered new elections, and restored parliamentary government with reasonable speed. It is to be assumed that this power will not be exercised without good cause, and, it is submitted, six months is too brief a maximum period to ensure that the object of the exercise of these powers will be achieved.

A proclamation of this kind vests the provincial executive power in the President, and the legislative power in Parliament. Parliament may subsequently vest the legislative power in the President, and empower the National Assembly by resolution, or the President, when it is not in session, to authorise expenditure from the provincial consolidated fund.

In both countries the President may issue a proclamation of financial emergency if he is satisfied that the financial stability or credit of any part of the country is in danger, but in Pakistan he is obliged first to consult the provincial governors. In India such a proclamation is subject to the same parliamentary control as a proclamation of emergency. In Pakistan it is subject to the same parliamentary control as a proclamation suspending a provincial constitution; its maximum period of validity is six months, which would seem to be a short period for the solution of a financial crisis. The consequences are that the centre can give directions to the unit in financial matters, and the President may reduce the salaries of public servants, including the judges of the Supreme Court and High Courts. In India, in addition, a Governor may be required to reserve all money Bills for the consideration of the President.

## THE JUDICIARY

The Supreme Court consists of a Chief Justice and six other judges. The Chief Justice is appointed by the President, but not in his discretion, and there is no provision, as in India, for consultation with the judges of the Supreme Court and High Courts, but the Chief Justice must be consulted on the appointment of the other judges. A judge of the Supreme Court must have been a judge of a High Court for five years, or a practitioner in a High Court for fifteen years. He vacates office at sixty-five; he may resign. He may be removed for misbehaviour or infirmity of body or mind on an address by the National Assembly supported by two-thirds of those present and voting.

The court normally sits at Karachi, but must hold two sittings annually at Dacca. It has original jurisdiction in disputes between the federation and a province, or between provinces, which involve the interpretation of the constitution, or any question of law or fact on which a legal right depends. The " legal right " referred to need not be enforceable in a court.[8] Suits between the federation or a province on the one side, and a private individual on the other do not lie to the Supreme Court, but to the court which would have jurisdiction if the dispute were between two private individuals. The Supreme Court has also original jurisdiction to entertain petitions for writs to protect infringements of the fundamental rights.

An appeal lies from a High Court on a constitutional point, either on the certificate of the High Court, or by leave of the Supreme Court. In civil proceedings an appeal lies if the amount in dispute, both at the time of institution, and at the time of appeal is Rs. 15,000 or more (the corresponding figure in India is Rs. 20,000), or if the decision involves a claim to property of that value, or if a High Court certified the case as fit for appeal. In criminal cases an appeal lies on the certificate of the High Court, or if, on appeal against an acquittal, sentence of death or transportation for life has been passed, or if either such sentence has been passed in a case removed from the court ordinarily having jurisdiction for trial in the High Court. The last two provisions for criminal appeals cover two omissions in the scheme in the Code of Criminal Procedure; India limits the right of appeal in such circumstances to cases in which a capital sentence has been passed. India further has no comparable provision to the constitutional right in Pakistan of appeal from a High Court order punishing for contempt. The Supreme Court may give special leave to appeal from any order of any tribunal not constituted under a law relating to the armed forces.

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[8] *U.P.* v. *G.G.*, A.I.R. [1939] F.C. 58.

The Supreme Court has an advisory jurisdiction in questions of law (in India it extends to questions of fact) referred to it by the President, but may refuse jurisdiction. In Pakistan the advisory judgment of the Federal Court on a reference by the Governor-General successfully brought to an end the constitutional crisis following the dismissal of the first Constituent Assembly.[9]

The law declared by the Supreme Court is binding on all other courts. In India this is interpreted to including *obiter dicta*, but there is a difference of opinion regarding advisory judgments. Presumably the Supreme Court will hold as the Federal Court has done, that it is not bound by the principle of *stare decisis*.[10]

The judges of the High Courts are appointed by the President, after consultation with the Chief Justice of Pakistan, the Governor of the province, and, in the case of puisne judges, the chief justice of the court. A candidate for appointment must have held judicial office for ten years, or have practised before a High Court for ten years or be a member of the Pakistan Civil Service of ten years standing, who has exercised the powers of a district judge for three years. A judge of High Court holds office until he is sixty. Whereas India gives judges of the High Courts the same immunity as judges of the Supreme Court, in Pakistan they are removable on a report of the Supreme Court, on a reference made by the President. The remuneration and conditions of service of the judges of the Supreme Court and High Courts may not be varied to their disadvantage during their tenure of office. Except on a motion to remove a judge of the Supreme Court, no judge's conduct may be discussed in a legislature. Judges of the Supreme Court and High Courts are ineligible for the offices of Governor, Attorney-General, and Advocate-General. An ex-judge of the Supreme Court may not practise at the Bar; and an ex-judge of a High Court may not practise in the province over which that court exercised jurisdiction.

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[9] *Ref. by the G.G.*, P.L.D. [1955] F.C. 435.

[10] *Anwar* v. *Crown*, P.L.D.,[1955] F.C. 185.

The High Courts have power to remove from subordinate courts cases involving constitutional questions, and either dispose of the whole case, or determine the constitutional point, and remit the case for further disposal. They may entertain writ petitions, not only for the protection of the fundamental rights, but also "for any other purpose." It seems unfortunate that the opportunity was not taken to define the limits of this jurisdiction, for, judging by Indian experience, a spate of such petitions may be anticipated, and the courts will be obliged to define their own limits to this jurisdiction. The Indian courts accept jurisdiction, if a legal right is involved, provided that there is no adequate alternative remedy, and that substantial injustice would result if jurisdiction were refused.

There are no provisions comparable to those in the Indian constitution giving the High Courts powers of judicial superintendence over subordinate courts, but the field of judicial superintendence is adequately covered by jurisdiction to hear writ petitions. The existing laws preserved by the constitution include letters patent and other instruments dealing with jurisdiction and powers of High Courts. The High Court of East Pakistan at Dacca, and the High Court of West Pakistan at Lahore, with benches at Karachi and Peshawar, will exercise the same jurisdiction and powers as before the constitution, until the appropriate legislature provides otherwise. Each legislative list includes power to legislate on jurisdiction and powers of all courts except the Supreme Court in regard to matters on that list, but administration of justice, and the constitution and powers of all courts except the Supreme Court are exclusively provincial powers. Except in so far as central laws in regard to matters within their sphere provide otherwise, it is for the provincial legislature to legislate on jurisdiction and powers of the High Court and all subordinate courts.

## FUNDAMENTAL RIGHTS

The Fundamental Rights in the Pakistan Constitution cover much the same ground as those in the Indian Constitution, and, as in India, they are enforceable in the Supreme Court and the High Courts by writs of habeas corpus, mandamus, prohibition, quo warranto, certiorari, and other appropriate orders.

As in India, the constitutional protection of life and liberty, the right to compensation for deprivation of property, freedom from forced labour, and freedom from compulsory religious education in schools are not confined to citizens, but the right to equal protection of equal laws, and the right to profess, practise and propagate religion, which in India are available to all persons, are restricted to citizens in Pakistan.

India being a secular State, and Pakistan an Islamic State, there are inevitably differences in the protection guaranteed to religious denominations. In India, no person can be taxed to promote or maintain a religion, not even his own, but in Pakistan a person may be taxed to maintain his own religion. In India the right to profess, practise and propagate religion may be restricted in the interests of public order, morality and health, and in the interests of social welfare and reform. As interpreted by the courts, a man may believe what his conscience approves, and rites which are of the essence of a religion will be protected from interference, but bigamy and excommunication have been forbidden by laws which have been held valid. Secular activities of religious bodies can claim no immunity from State control. In Pakistan the same right is " subject to law, public order and morality." If " law " is to be read disjunctively from " public order and morality," there will be little protection for minorities.

In India, religious denominations may establish, maintain and manage religious institutions, subject to public order, morality and health; the State may regulate the administration of their property, but cannot vest its management in a secular authority. In Pakistan this right again is " subject to law, public order and morality," which would seem to authorise wider interference by the State. Nevertheless, the Pakistan Constitution permits a religious denomination, not only to establish its own schools, but also to provide religious instruction for pupils of that denomination, though no person attending a school can be required to participate in worship or to receive instruction in any religion other than his own. In India there is no religious instruction in State schools, and in State-aided schools a pupil cannot be required to participate in worship or instruction in any religion without his consent, or that of his guardian, if he is a minor. In both countries, no citizen can be denied admission to a State-aided school on grounds of race, religion or caste.

In India, there must be no discrimination in aid to educational institutions on ground of religion or language; in Pakistan discrimination against any community in granting concessions or exemptions from taxation of its institutions is forbidden.

As in India, the citizen has the right of free access to places of public resort. Any section of citizens with a distinct culture has the right to preserve it.

The guarantee of equal protection of equal laws will doubtless be construed, as in India, as justifying legislation for or against a class, if the classification has a rational basis [11]; there is no restriction on legislation discriminating against non-citizens. Though discrimination in appointment to public office is forbidden, subject to a ten-year moratorium to ensure adequate representation of all classes and areas, Pakistan has no provision corresponding to that in the Indian Constitution forbidding discrimination in relation to other matters on grounds of religion, race, caste, sex or place of birth. It will be more difficult in Pakistan than in India to impugn laws discriminating against non-Muslims and women.

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[11] *Bombay* v. *Balsara*, A.I.R. [1951] S.C. 318

In the Bill presented to the second Constituent Assembly, the ordinary democratic freedoms were declared subject to restrictions which would have left little scope for judicial review, but amendments have brought all, except the right to follow an avocation, very close to the Indian version of these rights. Except to the right last mentioned, restrictions must be reasonable; the Indian courts hold a restriction to be reasonable if, judged by the standards of the average prudent man, neither the substantive nor procedural provisions of the impugned statute impose limitations on the right which are arbitrary, or beyond what is required in attaining the permissible object of the restriction.[12] Freedom of speech may be reasonably restricted in the interests of security, foreign relations, public order, decency, morality, and in relation to contempt of court, defamation and incitement to an offence. Freedom of assembly is only permitted when it is peaceable and without arms; it may be reasonably restricted in the interests of public order. Freedom of association may be reasonably restricted in the interests of morality and of public order. Freedom of movement, freedom of residence, and freedom to deal with property may be reasonably restricted in the public interest. When these rights are pleaded against a statute, judicial review extends, not only to reasonableness, but also to the question whether the restriction is in the prescribed interest. The citizen may only follow an avocation not forbidden by law, provided he has the necessary qualifications, if any, which the law prescribes; there is no protection against nationalisation of a trade, industry or business, nor against regulation by licence. As the Sharia forbids lending money at interest, legislation forbidding moneylending may be enacted in Pakistan, and could not be impugned. In India such legislation could be impugned as neither reasonable nor in the public interest.

The article dealing with protection of property, as in India, forbids expropriation except by authority of a law which provides for compensation, but it does not, as its Indian counterpart does, require confiscatory provincial legislation to be reserved for the President's assent. A provision in the Bill excluding the adequacy of the compensation from the cognisance of the courts has been deleted, so that " compensation " presumably means " adequate compensation." As in India, existing laws are not liable to be impugned, nor is legislation to prevent danger to life, property or public health, or dealing with evacuee property. Pakistan also gives protection against invalidation to laws providing for the temporary State management of property for the owner's benefit, *e.g.*, Court of Wards legislation.

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[12] *N. B. Khare* v. *Delhi*, A.I.R. [1950] S.C. 211; *Dwarka Prasad* v. *U. P.*, A.I.R. [1954] S.C. 2.

No person may be deprived of life or liberty " save in accordance with law." Words different from those in the corresponding Indian article have presumably been deliberately chosen to eliminate the argument that " due process " is implied. As in India, *nullum crimen, nulla poena, sine lege*, but there are no provisions corresponding to India's *nemo debet bis vexari*, and the rule that no person shall be compelled to be a witness against himself. As in India, an arrested person must be informed immediately of the grounds of his arrest, allowed to consult a lawyer of his choice, and produced before a magistrate within twenty-four hours. In the Bill, the provisions dealing with preventive detention provided, as does the Indian Constitution, for recourse to an advisory board, if the period of detention exceeded three months, except in cases excepted by Parliament, but the Pakistan Constituent Assembly insisted on every case of prolonged detention being referred to an advisory board, appointed by the Chief Justice of Pakistan or the Chief Justice of the province.

## ISLAMIC PROVISIONS

The *raison d'être* of Pakistan was that Muslims should be able to order their lives in accordance with the teachings of Islam. Ever since Pakistan came into existence how this is to be achieved has been a vexed question. Among the directive principles which, though not enforceable by a court, are the declared objectives of State policy, it is laid down that steps shall be taken to enable Muslims to order their lives in accordance with the Quran and the Sunna, and, in a chapter which also provides for the establishment of an institute to assist in the reconstruction of Muslim society on an Islamic basis, which is to be maintained out of the proceeds of a special tax imposed only on Muslims, it is ordained that no law repugnant to the injunctions of Islam, as laid down in the Quran and the Sunna, shall be enacted, and all existing laws shall be brought into conformity with these injunctions. The means by which these objectives are to be attained and the stages in which the existing laws are to be revised are to be the subject of an inquiry by a commission to be appointed by the President within a year. The commission will also define such Islamic principles as can be given legislative effect for the guidance of the legislatures. It may submit interim reports, and its final report must be made within five years of its appointment; the reports are to be laid before the National Assembly, which will enact the necessary legislation. Neither the constitution nor the personal laws of non-Muslims comes within the commission's terms of reference.

The delay in settling Pakistan's Constitution has been due principally to the difficulty of reaching agreement on the implications of it being an Islamic State. An adequate measure of agreement has now been reached on a large number of constitutional questions. On the question of electorates, a compromise has given West Pakistan separate electorates for minorities, and East Pakistan joint electorates. On the settlement of Islamic principles and the method of their enforcement there is probably bitter controversy still to come. In the first Constituent Assembly, the representatives of the minorities argued that a constitution could not be both Islamic and democratic, that the majority were endeavouring to repeat an experiment abandoned as hopeless a millennium ago, that Turkey and other modern Muslim States had abandoned the Sharia and adopted foreign codes. Though the constitution goes further towards meeting the claims of minorities than the draft constitution of 1952, one of its directive principles is the elimination of interest on capital as early as possible; if this and other Islamic principles are to be made a paramount law, considerable amendments of existing law are inevitable, and public finance, commerce, and industry may be faced with uncontemplated difficulties. The paramount Islamic principles applicable to a particular Muslim sect are those recognised by that sect, but this only affects the personal law. The commission obviously faces an extremely difficult task.

Though in the first Constituent Assembly it was agreed to abandon the proposal to refer questions of repugnancy of legislation to Islamic principles to a nominated board of experts in the Sharia, and to entrust this duty to the Supreme Court, this question appears to have been reopened. As all legislation is already liable to be impugned as *ultra vires* of the enacting legislature and for repugnancy to the fundamental rights, one can only hope that the new criteria of validity by which legislation is to be judged will not be too exacting, and that judgment will be given by a body which will approach its task with a broad and realistic outlook.

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This digest, which has been compiled by the Editor, covers the period from July 1, 1956, to September 30, 1956.

## UNITED KINGDOM

### AGRICULTURE

**Statutory regulation**

*Safety, health and welfare.* The Agriculture (Safety, Health and Welfare Provisions) Act, 1956 (4 & 5 Eliz. 2, c. 49), received the Royal Assent on July 5, 1956. It provides for securing the safety, health and welfare of persons employed in agriculture and certain other occupations and the avoidance of accidents to children arising out of the use, in connection with agriculture, of vehicles, machinery or implements.

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS (p. 371, below); REMEDIES (p. 394, below); WALES (p. 398, below).

### ARMED FORCES

**National service**

*Exemption.* Neither a " congregation servant " nor a " pioneer publisher " within the organisation of Jehovah's Witnesses is " a regular minister of any religious organisation " within the meaning of para. 2 of Sched. I to the National Service Act, 1948, which is confined to persons having a spiritual status apart from other members of their denomination: WALSH *v.* LORD ADVOCATE [1956] 1 W.L.R. 1002, H.L.(Sc.).

### COMPULSORY PURCHASE

**Compensation**

*Deduction of income tax.* Where a loss of profits is claimed in respect of disturbance due to the compulsory acquisition of business premises, the compensation should be assessed by taking into account the fact that the profits, if earned, would have been subject to tax: WEST SUFFOLK COUNTY COUNCIL *v.* W. ROUGHT [1956] 3 W.L.R. 589; [1956] 3 All E.R. 216, H.L. (applying *British Transport Commission* v. *Gourley* [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796; distinguishing *Comyn* v. *Att.-Gen.* [1950] Ir.R. 142).

**Orders.** See below, p. 372.

### CONTRACT

**Government contract**

*Statutory provision.* By the terms of a contract entered into in 1886 between the contractor, whose rights and interests were assigned to the appellant in 1890, and the Government of Western Australia, it was provided, *inter alia*, that the Government would " grant in fee simple to the contractor by Crown grants in the form prescribed by the Land Regulations of the

Colony" a subsidy in land for every mile of railway which the contractor was to build under the contract. The form of grant in fee simple prescribed by the then Land Regulations of 1882 reserved "all mines of gold, silver and other precious metals in and under the said land." After 1890 grants were made in the form prescribed by the Land Regulations. Grants were also made after the commencement of the Petroleum Act, 1936, of Western Australia, which provided by section 9 that "notwithstanding anything to the contrary contained in any . . . grant . . . whether made or issued before or after the commencement of this Act, all petroleum on or below the surface of all land within this state, whether alienated in fee simple or not so alienated from the Crown is and shall be deemed always to have been the property of the Crown." After the respondent state of Western Australia had given a permit to a petroleum company to explore for petroleum over lands which included lands granted to the appellant pursuant to the contract, the appellant claimed a declaration that the Petroleum Act, 1936, had no application to the lands granted to him. *Held*, on the true construction of the contract, it imposed on the Crown no more than an irrevocable obligation to grant a fee simple of the surface of the land in whatever might be the form current at the date when any particular grant was called for, without the addition of a further obligation to ensure that the legislature would not at any time during the currency of the contract alter the prescribed form of the grant; neither the grants made after, nor the grants made before, the Petroleum Act, 1936, were exempt from its operation: MIDLAND RAILWAY CO. OF WESTERN AUSTRALIA *v*. STATE OF WESTERN AUSTRALIA [1956] 1 W.L.R. 1037; [1956] 3 All E.R. 272, P.C.

## COURTS

### Administration of Justice

*Statutory amendment.* The Administration of Justice Act, 1956 (4 & 5 Eliz. 2, c. 46), received the Royal Assent on July 5, 1956. The Act amends the law relating to Admiralty jurisdiction, legal proceedings in connection with ships and aircraft and the arrest of ships and other property; makes further provision as to the appointment, tenure of office, powers and qualifications of certain judges and officers; makes certain other amendments of the law relating to the Supreme Court and the county courts and the law relating to the enforcement of certain judgments, orders and decrees; and enables certain funds in court in the Lancashire Chancery Court to be transferred to the official trustees of charitable funds or the Church Commissioners.

Section 57 (4) provides that the provisions of the Act (other than Part V, section 55 and Sched. I—which relate to Scotland and Northern Ireland) shall come into force on such day as the Lord Chancellor may appoint. The Lord Chancellor has appointed July 16, 1956, as the day for the coming into force of sections 9–14, 16–25, 32 (1) (3), 33, 36, 38, 40, 42–44, 51–54 (S.I. 1956 No. 1065).

### Appeals

*Judicial Committee of the Privy Council* was the subject of a debate on the adjournment in the House of Commons on June 29, 1956 (555 H.C. Deb. 955–964).

### Jurisdiction

*Appeal from Lands Tribunal.* Section 3 (4) (11) (*a*) of the Lands Tribunal Act, 1949, provides: "A decision of the Lands Tribunal shall be final: Provided that any person aggrieved by the decision as being erroneous in point of law may . . . require the tribunal to state and sign a case for the decision of . . . the Court of Appeal."

Building contractors employed by the L. C. C. to build schools on a site erected huts on the site, for the purpose of carrying out the works, which remained on the site some eighteen months. *Held*, if the natural consequence of the manner in which the builders erected and used these huts satisfied the true test of rateability, the tribunal of fact could properly come to the conclusion that the builders so intended whether or not that was their conscious purpose and whatever they might have called the component parts of the huts; the question was eminently one of fact; there were no grounds for saying that the tribunal misdirected themselves or for disturbing their decision; consequently, the appeal must be dismissed: LONDON COUNTY COUNCIL *v.* WILKINS [1956] 3 W.L.R. 505; [1956] 3 All E.R. 38, H.L. (affirming decision of Court of Appeal [1955] 2 Q.B. 653; [1955] 2 W.L.R. 1095; [1955] 2 All E.R. 180; applying *John Laing and Son* v. *Kingswood Assessment Committee* [1949] 1 K.B. 344; [1949] 1 All E.R. 224).

*Per* Lord Kilmuir L.C.: "It must not be forgotten that, by virtue of the Lands Tribunal Act, 1949, a decision of the tribunal is final; but a person aggrieved by such a decision, as being erroneous on a point of law, is entitled to require the tribunal to state a case for the decision of the Court of Appeal. It is . . . particularly important in these days, when juries in civil matters are seldom seen, that reserved fields of fact should be inviolate and that appellate courts should not, by the intrusion of their factual opinions, make more difficult the correct decision on particular circumstances."

*Crown proceedings.* An Order has been made under section 34 of the Crown Proceedings Act, 1947, enabling civil proceedings by or against the Crown to be instituted in the Court of Chancery of the County Palatine of Lancaster and prescribing the conditions under which that court may exercise jurisdiction in relation to such proceedings (S.I. 1956 No. 1215).

*Land Registration.* Rules have been made empowering the same Court of Chancery to entertain proceedings under the Land Registration Act, 1925 (S.I. 1956 No. 1024).

### Legal Aid

*Report.* The Select Committee on Estimates have laid before the House of Commons the observations of the Lord Chancellor on their Fourth Report. His observations deal with each of their Recommendations (for which see above, pp. 250–251). Recommendation (1): the Lord Chancellor proposes to initiate the review suggested, through inquiries of H.M. Judges, officers of the Supreme Court, the Legal Aid Committee of The Law Society and of his Advisory Committee and to ask his Advisory Committee to publish the results of the inquiry in their comments upon The Law Society's Sixth Annual Report on the Operation and Finance of the Legal Aid Scheme. Recommendation (2): the Lord Chancellor agrees but hopes that The Law Society will be able to effect greater savings in the cost of the Divorce Department than was previously considered possible. Recommendation (3): the Lord Chancellor agrees and is taking the necessary steps to effect it. Recommendation (4): the Lord Chancellor agrees and will draw the attention of The Law Society to this. Recommendation (5): the Lord Chancellor is giving this matter his consideration. Recommendation (6): in the Lord Chancellor's opinion limited certificates should be issued whenever a Committee, while satisfied on the facts disclosed by the applicant that there are reasonable grounds for granting legal aid for steps preliminary to proceedings or in interlocutory matters, are in doubt whether the applicant has shown reasonable grounds, either for the proceedings themselves or for a grant of legal aid beyond the interlocutory stage. He would deprecate the issue of limited certificates, either where the facts are in doubt to such an extent that the applicant has failed to discharge the onus put upon him by section 1 (6) of the Legal Aid and Advice Act, under which legal aid shall not be given unless the applicant shows reasonable grounds for taking, defending or being a party to proceedings, or when the applicant has discharged that onus but the facts are in doubt only in the sense that there is a triable issue for determination by the courts. He assumes that the Select Committee are also of his opinion and he will pass his views to The Law Society. Recommendation (7): the Lord Chancellor will consult The Law Society as to what procedure, if any, can be devised for this purpose. Recommendation (8): the Lord Chancellor agrees and will direct the attention of The Law Society to this. Recommendation (9): the Lord Chancellor will discuss this with the Lord Chief Justice, the Master of the Rolls and the President of the Probate, Divorce and Admiralty Division. Recommendation (10): the Lord Chancellor will ask The Law Society to carry out this. Recommendation (11): the Lord Chancellor will consult Taxing Masters and Registrars as to whether the powers available to them under Rules of Court, under which they are able to penalise a solicitor for delay in submitting his bill, require strengthening and will draw the matter to the attention of The Law Society. Recommendation (12): the Lord Chancellor has this much in his mind and is considering the implications of the Committee's suggestion (Second Special Report from the Select Committee on Estimates (H.C. 346 of 1955–1956) ).

### Statistics

*Civil judicial, Scotland.* The statistics have been published relating to the House of Lords, Court of Session, Sheriff and other Civil Courts, Licensing Courts, certain Legal and Public Departments, Bankruptcy, Court Fees and Fees taken in the Departments for 1955 (Cmd. 9808).

## EDUCATION

### Report

The Report has been published for 1955 of the Ministry of Education and the statistics of public education for England and Wales (Cmd. 9785). The Report was considered in a debate in Committee of Supply in the House of Commons (557 H.C. Deb. 428–546, July 25, 1956).

## GOVERNMENT FUNCTIONS AND APPOINTMENTS

### Civil Service

*Duties.* The Prime Minister stated that on the forthcoming retirement of the present Permanent Secretary to the Treasury the post would lapse and two Joint Permanent Secretaries (Sir Norman Brook and Sir Roger Makins) would be appointed. Sir Norman Brook, in addition to his duties as Secretary of the Cabinet, would advise the Prime Minister on problems of Government machinery and would have general charge of the organisation and management of the Home Civil Service. He would advise the Prime Minister in his capacity as First Lord of the Treasury on appointments to senior posts in that Service and would be official Head of the Home Civil Service. He would advise the Chancellor of the Exchequer on matters concerning pay and other conditions of service. Sir Roger Makins would have charge under the Chancellor of the Exchequer of the financial and economic work of the Treasury (557 H.C. Deb. 639–642, July 26, 1956).

*Staffs employed.* Statements have been issued showing the members of the Civil Staffs employed in Government Departments on April 1, 1956, and July 1, 1956. They show a total of 639,485 (including 252,940 Post Office staffs) on the later date, which is an increase of 709 as compared with the earlier date (Cmd. 9784, 9840; see also above, p. 144).

*Status.* The action *per quod servitium amisit* only lies when the servant can properly be regarded as a member of the master's household, that is, as part of the family: it does not lie at the instance of governments, limited companies, or other employers who keep no household.

*Per* Denning and Parker L.JJ.: The Crown is not debarred from bringing the action simply because it is the Crown, nor because there is no contract of service between itself and its servants, nor because it can dismiss its servants at will. If the action did lie generally, wherever the relationship of master and servant existed, the Crown might in many cases sue.

*Per* Denning L.J.: The payment of sick pay by the Crown is a voluntary act and is not recoverable as such, but it might be used as some evidence of the value of the lost services.

On the facts set out above, p. 253, *held*, the action *per quod servitium amisit* did not lie in respect of a person in the situation of B.: I. R. C. *v.* HAMBROOK [1956] 3 W.L.R. 643; [1956] 3 All E.R. 338, C.A. (applying *Att.-Gen. for New South Wales* v. *Perpetual Trustee Co.* [1955] A.C. 457; [1955] 2 W.L.R. 707; [1955] 1 All E.R. 846; disapproving *Att.-Gen.* v. *Valle-Jones* [1935] 2 K.B. 509; considering *R.* v. *Richardson* [1948] S.C.R. 57; distinguishing *Admiralty Commissioners* v. *The S.S. Amerika* [1917] A.C. 38).

### Ministers' Functions

*Clean Air Act, 1956* (*4 & 5 Eliz. 2, c. 52*). Under this Act the Minister of Housing and Local Government (as respects Scotland, the Secretary of State) has power to make regulations, give directions to local authorities, hear appeals from decisions of local authorities, confirm orders made by local authorities, make Exchequer contributions to local authorities. In addition to these and other functions the Minister is required to appoint a consultative council to be called the Clean Air Council, of which he is to be chairman (and see PUBLIC HEALTH, below, p. 394).

*Compulsory purchase orders.* The Minister of Housing and Local Government stated the number of orders he had confirmed, modified or rejected in 1954 and 1955. The totals were, for 1954: confirmed 586, modified 153, rejected 95; and, for 1955, confirmed 594, modified 246, rejected 62 (556 H.C. Deb. *77–78*, July 17, 1956).

*Debates* in Committee of Supply took place in the House of Commons on Ministry of Education (557 H.C. Deb. 428–546, July 25, 1956) and the Home Office (555 H.C. Deb. 1001–1126, July 2, 1956).

*Reports.* The Annual Reports for 1955 of the Ministry of Labour and National Service (Cmd. 9791), the Ministry of Pensions and National Insurance (Cmd. 9826) and the Ministry of Health (Part I. National Health Service; Welfare, Food and Drugs; Civil Defence) (Cmd. 9857) have been published.

See also EDUCATION, **Report** (above, p. 371).

### New Towns

*Reports.* The Annual Reports for 1955–1956 of the East Kilbride and Glenrothes Development Corporations have been published (H.C. 324 of 1955–1956).

### Regional Organisation

*Review.* The Minister of Agriculture, Fisheries and Food stated his decisions following the report of the Arton Wilson Committee (see above, p. 254). He decided to leave the present structure of agricultural executive committees unchanged though with some reduction in sub-committees; he did not accept the substantial changes recommended by the Committee. He accepted the recommendations for reorganising the executive work of the present sixty county offices into a smaller number of divisional executive offices and for the appointment of regional controllers. He stated that he would give separate consideration to the position of the Welsh Secretary. Many other recommendations remained to be considered and the necessary consultations were proceeding. The decisions made in no way prejudiced consideration in due course of any recommendations of the Franks Committee on Administrative Tribunals and Enquiries (557 H.C. Deb. *183–185*, August 2, 1956).

**Research**

*Department of Scientific and Industrial Research.* The first Report of the Jephcott Committee (see above, p. 255) forms the basis of the Department of Scientific and Industrial Research Act, 1956 (4 & 5 Eliz. 2, c. 58). The Act provides that the Department shall be placed under the charge of a Council for Scientific and Industrial Research, whose functions shall be exercised on behalf of the Crown and whose members shall be appointed by the Lord President of the Council after consultation with the President of the Royal Society. The Research Council is required to comply with any directions given to them by a Committee of the Privy Council consisting of the Lord President of the Council and such other members as H.M. may appoint. The Research Council is charged with the organisation, development and encouragement of scientific and industrial research and with the dissemination of the results of such research and may make grants. The Secretary of the Research Council is to be appointed by the Lord President of the Council after consultation with the Research Council and the other officers and servants of the Department shall, subject to the consent of the Treasury as to number, be appointed by the Research Council; and the Secretary, officers and servants so appointed shall be paid such salaries and allowances as the Research Council may, with the consent of the Treasury, determine. The Lord President of the Council determines the size of the Research Council and nominates its chairman. The Research Council is a body corporate and any land or interest in land acquired by the Research Council is to be held on trust for H.M. for the public service. There shall be paid to the members of the Research Council and to co-opted members of committees such remuneration as the Treasury may authorise. The Research Council is to submit an annual report to the Privy Council Committee and the report is to be laid before Parliament.

The Reports of the Food Investigation Board (with the Report of the Director of Food Investigation), the Fuel Research Board (with the Report of the Director of Fuel Research), the Radio Research Board (with the Report of the Director of Radio Research), the Road Research Board (with the Report of the Director of Road Research), for 1955, have been published (D.S.I.R. 47–7, 10, 77, 98–0–55).

*Interdepartmental Committee on Social and Economic Research.* The third Report of this Committee has been published, under the headings: Membership, Co-opted Members of Sub-Committees, Introductory, Recommendations and Results (1947–1955), Research Value of Material in Government Departments, Availability of Research Material in Government Departments, Surveys of Material in Government Departments, Departments and Subjects (Board of Trade, Tabulations for the Census of 1951, Local Government Statistics, Food Statistics, the Future of Departmental Records, Comparability of Statistics). The terms of reference of the Committee are: to survey and advise upon research work in Government Departments, and in particular (a) to bring to the notice of Departments the potential value for research purposes of the material which they collect and to suggest new methods and areas of collection; (b) to advise on how there could be made available to research workers information gathered for their own purposes by the Departments which has potential value as material for research (Lord President's Office 70–742).

*Medical Research Council.* The Report for 1954–1955 has been published (Cmd. 9787).

**Security**

*The Three Advisers.* The Secretary to the Treasury stated that as discussions with the Staff Side of the National Whitley Council were still in progress, he was not yet able to announce the amended terms of reference to the three advisers who dealt with security cases in the public service, as proposed by the Conference of Privy Councillors, but that Sir Alexander Little, former Director-General of the Post Office, had succeeded Sir Thomas Gardiner as Chairman (555 H.C. Deb. *145–146*, July 6, 1956).

### Wages Councils

*Abolition.* The Minister of Labour and National Service has made an order abolishing the Chain Wages Council (S.I. 1956 No. 1359).

*Establishment.* Following the Report of a Commission of Inquiry (see above, p. 256) the Minister has made an order establishing a Wages Council for the Rubber Proofed Garment Making Industry (S.I. 1956 No. 1437).

## HIGHWAYS

### Right of way

*Evidence of user.* Section 1 (1) of the Rights of Way Act, 1932, provides: " Where a way . . . upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way . . ." Subsection (6) provides: " Each of the respective periods of years mentioned in this section shall be deemed and taken to be the period next before the time when the right of the public to use a way shall have been brought into question by notice as aforesaid or otherwise." On the facts set out above, p. 147, *held*, the period of twenty years laid down by the Act was not to be reckoned from January 1, 1934, but any way used uninterruptedly and as of right for a period of twenty years could be claimed as a public way, whenever the period of twenty years occurred, subject to the provisions of the Rights of Way Act, 1932; the footpath in question was a public way as claimed by the respondents: FAIREY *v.* SOUTHAMPTON COUNTY COUNCIL [1956] 3 W.L.R. 354; [1956] 2 All E.R. 843, C.A. (affirming decision of Divisional Court; applying *Cooper* v. *Hubbuck* (1862) 12 C.B.(N.S.) 456; *R.* v. *Broke* (1859) 1 F. & F. 514; and *Att.-Gen. and Newton Abbot R. D. C.* v. *Dyer* [1947] Ch. 67; [1946] 2 All E.R. 252).

## HOUSING

### Slum Clearance

*Administrative procedure.* The Ministry of Housing and Local Government has issued a circular on the simplification and acceleration of this procedure. This provides, *inter alia*, that in presenting their case at local inquiries under the Housing Act, 1936, local authorities should make clear why they have chosen to proceed by way of clearance order or by way of compulsory purchase order and, in the latter case, the use to which the area will be put. The circular states: " It is frequently of importance to objectors to know the reasons which have determined the Council's choice, and this information will in any event assist the Minister in reaching his decision " (Circular No. 44/56).

*Compensation.* The Slum Clearance (Compensation) Act, 1956 (4 & 5 Eliz. 2, c. 57) received the Royal Assent and came into operation on August 2, 1956. The main purpose of the Act is to provide increased payment of compensation to owner-occupiers of houses bought between September 1, 1939, and December 12, 1955, and business occupiers of premises with a freehold or appropriate leasehold interest, in the event of the compulsory purchase, clearance or demolition of the house (see also Ministry of Housing and Local Government Circular No. 43/56).

### Subsidies

*Statutory powers.* The Ministry of Housing and Local Government has issued a circular on the Housing Subsidies Act, 1956 (see above, p. 148) (Circular No. 33/56).

## INQUIRIES

### Marketing scheme

The Report of the Commissioner who conducted the Public Inquiry into objections to the draft British Egg Marketing Scheme, Mr. G. G. Baker Q.C., has been published (Cmd. 9805; and see above, p. 173). The Commissioner concluded that a scheme under the Agricultural Marketing Acts would assist the efficient marketing of eggs but recommended a number of modifications to the draft. The decision to publish the Report was announced by the Minister of Agriculture, Fisheries and Food who said that the decision was without prejudice to any conclusions Ministers might reach after receiving the report of the Franks Committee (555 H.C. Deb. 968, July 2, 1956). Previous similar reports have not been published. It was later announced that the promoters of the scheme (the National Farmers' Unions of England and Wales, and of Scotland, and the Ulster Farmers' Union) had been notified of the modifications that the Agricultural Ministers would require to be made (557 H.C. Deb. *191*, August 2, 1956). On September 19, 1956, a conference in London of representatives from the three farmers' unions overwhelmingly adopted a resolution to accept the modifications (*The Times*, September 20, 1956).

### Transport

*Air*. The Report has been published on the accident on January 20, 1956, to Viscount G–AMOM at Blackbushe Airport. The Report is dated April 6, 1956 (Civil Aircraft Accident Report No. C. 647).

*Railway*. The Report has been published on the accident on November 20, 1956, at Milton, near Didcot in the Western Region. The Report is dated March 26, 1956 (55–365).

The Report has been published on the accident on December 22, 1955, at Luton Station in the London Midland Region. The Report is dated May 11, 1956.

The Report has been published on the accident on December 2, 1955, near Barnes Station in the Southern Region. The Report is dated June 27, 1956 (55–366).

The Report has been published on the accident on December 1, 1955, at Bromley (Bromley-by-Bow) Station in the Eastern Region. The Report is dated May 31, 1956.

The Report has been published on the accident on March 24, 1956, at Old Trafford Junction in the London Midland Region. The Report is dated May 11, 1956.

The Report has been published on the collision on December 23, 1955, near Woking in the Southern Region. The Report is dated June 22, 1956.

## LOCAL GOVERNMENT

### Elections

*Statutory amendment*. The Local Government Elections Act, 1956 (4 & 5 Eliz. 2, c. 43) received the Royal Assent on July 5, 1956. The Act provides for the simultaneous holding of elections of rural district councillors and parish councillors, requires the expenses incurred in relation to the holding of elections of parish councillors to be paid by the council of the rural district within which the parish is situate, provides for excluding certain days in computing the period of time within which elections to fill casual vacancies occurring in the offices of county, borough and district councillor and elective auditor are required to be held.

### Finance

*Borrowing*. The Public Works Loans Act, 1956 (4 & 5 Eliz. 2, c. 65) received the Royal Assent on August 2, 1956. The Act provides that there may be issued by the National Debt Commissioners for the purpose of local loans by the Public Works Loan Commissioners any sum or sums not exceeding in the whole the sum of £300m.

*Grants.* Regulations have been made which introduce two changes into the arrangements for paying grant on the expenditure incurred by Local Education Authorities on school milk and meals. First, grant will in future be paid in respect of the cost of purchasing milk for independent and direct-grant grammar schools; and secondly, the rules for calculating grant on meals, other than dinners, are simplified (S.I. 1956 No. 1321).

*Rating and valuation.* The Ministry of Housing and Local Government has approved increases in the salary gradings of full-time clerks to local valuation panels (Circular No. 40/56).

The Valuation and Rating (Scotland) Act, 1956 (4 & 5 Eliz. 2, c. 60) received the Royal Assent on August 2, 1956. The Act amends the law regarding valuation and rating in Scotland and the provisions of the Local Government (Financial Provisions) (Scotland) Act, 1954, with respect to the payment of Exchequer Grants to local authorities in Scotland and with respect to the apportionment of the expenditure of joint bodies among their constituent authorities.

An Order has been made prescribing the fees, charges and expenses in respect of, and incidental to, the levying of distress for rates (S.I. 1956 No. 1403).

See also COURTS (p. 369, above); TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (p. 396, below).

**Fire Services**

*Report.* The Report has been published of H.M.'s Chief Inspector of Fire Services (Counties and County Boroughs, England and Wales) for 1955 (Cmd. 9845).

**Inquiry**

*Blackpool County Borough Council.* After receipt of a letter from the Ministry of Housing and Local Government which stated that none of the matters disclosed justified a Ministerial inquiry, a motion that the council should form an all-party committee to go into allegations of bribery and corruption was heavily defeated (*The Times,* August 2, 1956, and see above, p. 257).

**Officers**

*Designation.* The Sanitary Inspectors (Change of Designation) Act, 1956 (4 & 5 Eliz. 2, c. 66), received the Royal Assent on August 2, 1956. The Act changes the name of sanitary inspectors to that of public health inspectors.

**Police**

*Recovery of wages.* On similar facts concerning the right of a police authority to recover from a person who, by his negligence, had injured a police constable, the wages paid by the authority to the constable, Slade J. in METROPOLITAN POLICE DISTRICT RECEIVER *v.* CROYDON CORPORATION [1956] 1 W.L.R. 1113; [1956] 2 All E.R. 785, gave judgment for the plaintiff authority, and Lynskey J. in MONMOUTHSHIRE COUNTY COUNCIL *v.* SMITH [1956] 1 W.L.R. 1132; [1956] 2 All E.R. 800, gave judgment for the defendant. It is understood that appeals are pending.

**Powers**

*Ultra vires resolution.* Section 49 of the Education Act, 1944, provides: "Regulations made by the Minister shall impose upon local education authorities the duty of providing milk, meals and other refreshments for pupils in attendance at schools and county colleges maintained by them; . . . such regulations shall not impose upon teachers at any school or college . . . duties in respect of meals other than the supervision of pupils. . . ." The words "duties in respect of meals" must include the collection of money payable for the meals.

The plaintiffs, members of the National Association of Schoolmasters, employed by the defendants, claimed a declaration that a resolution by the defendant council that teachers, who were members of the N.A.S., and who had refused to collect money for school meals in school hours be given notice to terminate their engagement, was *ultra vires* and in breach of section 49 of the Education Act, 1944. The Provision of Milk and Meals Regulations, 1945, were made under section 49. *Held,* (1) the collection of money was clearly a duty in respect of meals other than supervision and was not a duty which could be imposed on teachers; and (2) it was not within the defendants' statutory powers to dismiss the plaintiffs for such reasons and, accordingly, the defendants' resolution was *ultra vires*, and there must be judgment for the plaintiffs: PRICE *v*. SUNDERLAND CORPORATION [1956] 1 W.L.R. 1253; [1956] 3 All E.R. 153, Barry J.

### Reorganisation

The Government White Paper on "Local Government: Areas and Status of Local Authorities in England and Wales" has been published (Cmd. 9831). Its provisions are discussed by the Clerk of London County Council above, pp. 336–349.

### Water

*Regrouping of undertakings.* The Ministry of Housing and Local Government issued a circular urging water undertakers to consider the need for regrouping, offering suggestions and indicating methods. There are still over 1,000 statutory water undertakers, including nearly 90 water companies, in England and Wales (Circular No. 52/56).

See also COMPULSORY PURCHASE (above, p. 368), EDUCATION (above, p. 371), GOVERNMENT FUNCTIONS AND APPOINTMENTS (above, p. 371), HIGHWAYS (above, p. 374), HOUSING (above, p. 374), TOWN AND COUNTRY PLANNING (below, p. 396).

## MONOPOLIES AND RESTRICTIVE PRACTICES

### General

The Restrictive Trade Practices Act, 1956 (4 & 5 Eliz. 2, c. 68), received the Royal Assent on August 2, 1956. The Act provides for the registration and judicial investigation of certain restrictive trading agreements, and for the prohibition of such agreements when found contrary to the public interest; prohibits the collective enforcement of conditions regulating the resale price of goods and makes further provision for the individual enforcement of such conditions by legal proceedings; amends the Monopolies and Restrictive Practices Acts, 1948 and 1953; and provides for the appointment of additional judges of the High Court and of the Court of Session (see also above, pp. 151–152).

### References

In accordance with the provisions of the Restrictive Trade Practices Act, 1956, the Board of Trade have given directions to the Monopolies and Restrictive Practices Commission as to which of the existing references are to be continued. The references to be continued are those on standard metal windows and doors, electronic valves and cathode ray tubes, tea, chemical fertilisers. The references on windows and doors and on tea will be continued in their existing forms. The report on electronic valves, etc., is now to be a factual report only. It is expected that these three reports will be received shortly. The reference on chemical fertilisers is being adapted to the Commission's new terms of reference under the Act and work on it will not be completed for some considerable time. The references which are being allowed to lapse are those on electrical street lighting equipment, steel frames for buildings, and electric batteries. The general inquiry into common prices and agreed tendering is also being allowed to lapse. Agreements embodying such practices will be subject to registration as from November 30, 1956, provided that Parliament approves the Registration of Restrictive Trading Agreements Order, 1956 (see below), which was made on August 2.

### Registration

*Order.* The Board of Trade has made the Registration of Restrictive Trading Agreements Order, 1956, to come into operation on November 30, 1956, if approved by resolution of each House of Parliament. Parliamentary approval is to be sought early in the new session. During the three months following November 30, particulars of the classes of agreement specified in the Order must be furnished to the Registrar of Restrictive Trading Agreements. The specified classes of agreement are, broadly, those which include restrictions as to prices or other terms or conditions or which involve collective discrimination. They, therefore, include agreements about common prices and conditions of sale, level or agreed tendering, agreements under which preferential terms are granted to certain persons or traders, and agreements under which supplies of goods are confined to certain persons or traders (see the Order, made on August 2; and statement by President of the Board of Trade in 557 H.C. Deb. *179*, August 2, 1956).

### Reports

*Electrical and Allied Machinery and Plant.* The President of the Board of Trade stated that he had received this Report from the Monopolies and Restrictive Practices Commission and that it would be laid before Parliament in due course (557 H.C. Deb. *12*, July 23, 1956).

*Industrial and Medical Cases.* The President of the Board of Trade also stated that he had received this Report which would be laid before Parliament (555 H.C. Deb. *79*, June 29, 1956).

*Linoleum.* The Report of the Commission on the supply of linoleum has been published. The Commission found that the conditions to which the Act applied prevailed because the members of the Linoleum Manufacturers' Association together supplied about 80 per cent. by value of the total home trade. The Commission made a number of conclusions and recommendations particularly relating to common prices, wholesalers' lists, the aggregated retail turnover bonus and the job pool scheme (H.C. 366 of 1955–1956).

*Rubber footwear.* The Report of the Commission on the supply of certain rubber footwear has been published. The Commission found that the conditions to which the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, applies prevail as regards the supply both of rubber boots and of canvas footwear because (a) more than one-third in quantity and value of each description of goods supplied in the United Kingdom is supplied by the members of the Rubber Footwear Manufacturers' Association and members of the Association of Hong Kong Rubber Footwear Importers together, and the members of each association so conduct their affairs as to restrict competition in connection with the supply of each description of goods, and (b) more than one-third in quantity and value of each description of goods supplied in the United Kingdom is supplied by members of the Rubber Footwear Manufacturers' Association alone.

The conditions prevail as regards the supply of rubber boots for the additional reason that the Dunlop Rubber Co. Ltd. alone supplies more than one-third in quantity and value of this description of goods supplied in the United Kingdom.

The Commission made a number of conclusions and recommendations. The President of the Board of Trade stated that so far as action on the Report was concerned, the Government did not propose to take action on matters which would be subject to the jurisdiction of the Restrictive Practices Court (557 H.C. Deb. *99–102*, July 31, 1956; for the Report see H.C. 328 of 1955–1956).

## NATIONAL HEALTH SERVICE

### Central Health Services Council

*Report.* The Report of the Council for 1955, preceded by a statement made by the Minister of Health, has been published (H.C. 329 of 1955–1956).

### Ophthalmic services

*Regulations* have been made providing for the appointment of a deputy to the member of an Ophthalmic Services Committee who is a dispensing optician, providing for the vacation of office of certain members of an Ophthalmic Services Committee, extending from one to three years the period of office of members of such a Committee (S.I. 1956, No. 1075).

*Regulations* have also been made consolidating the N.H.S. (Supplementary Ophthalmic Services) Regulations, 1948 (S.I. 1948 No. 1273, as amended by S.I. 1950 Nos. 1276 and 2092, S.I. 1951 No. 867, and S.I. 1953 No. 1177) with a number of amendments (S.I. 1956 No. 1078).

### Statistics

*Hospital and specialist services.* The statistics for England and Wales for 1923 have been published (Ministry of Health 32–416–0–53*).

See also GOVERNMENT FUNCTIONS AND APPOINTMENTS (p. 371, above); TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS (p. 396, above).

## NATIONAL INSURANCE

### Benefits

*Dependency provisions.* The Report has been published of the National Insurance Advisory Committee on the Question of Dependency Provisions (Cmd. 9855).

*Statutory increases.* The National Insurance Act, 1956 (4 & 5 Eliz. 2, c. 47) received the Royal Assent on July 5, 1956. Under the Act, from July 30, 1956, the net amount of 40s. a week which retirement and widow pensioners can earn without reductions in their pensions is raised to 50s. a week. Pensioners earning over 50s. a week will have only 6d. deducted from their pension for each shilling earned between 50s. and 70s. a week. One shilling will continue to be deducted for each shilling earned over 70s. a week. The amount which a widowed mother can earn without reduction remains at 60s. a week. But from July 30 only 6d. instead of a shilling will be deducted for each shilling earned between 60s. and 80s. a week. The appointed day of July 30 was fixed by Ministerial Order (S.I. 1956 No. 1071).

The Family Allowances and National Insurance Act, 1956 (4 & 5 Eliz. 2, c. 50) received the Royal Assent on July 5, 1956. Under the Act, from August 1, 1956, schoolchildren and apprentices count for family allowances, and children's benefits of the national insurance and industrial injuries scheme up to their eighteenth birthday. For disabled children the age limit is raised to their sixteenth birthday. From October 2, 1956, family allowances for third and younger children will be raised to 10s. a week. From the same date the allowance for widowed mothers will be increased by 5s. a week for each child. From August 21, 1956, a new benefit—widowed mother's personal allowance—became payable for widows who do not qualify for ordinary widowed mother's allowance because they no longer have a son or daughter at school or in apprenticeship. This allowance—normally 40s. a week—will be paid to a widow who has a son or daughter under eighteen living at home, even though the son or daughter is earning a living. It cannot be paid in addition to a widow's pension. A similar provision for widows is being made under the industrial injuries scheme. From August 21, 1956, the ten years of marriage required as a qualification for a widow's pension is reduced to three years (see also S.I. 1956 No. 1199). The Act gives the Minister power to make regulations under which widows will be covered for sickness and unemployment benefits if they had paid contributions during marriage. The Act extends section 64 of the National Insurance Act, 1946 (which provides for reciprocal arrangements with other countries) to cover family allowances. The appointed days for the commencement of the Family Allowances and National Insurance Act, 1956, were fixed by Ministerial Order (S.I. 1956 No. 1072). Regulations have been made prescribing the condition subject to which the increased rate of family allowance for third and younger children become payable under an award existing immediately before October 2, 1956 (S.I. 1956 No. 1346).

The Ministry of Housing and Local Government has issued a circular on the Pensions (Increase) Act, 1956 (see above, p. 260) (Circular No. 37/56). Regulations have been made modifying this Act (a) in respect of judicial service under the Sheriff Courts (Scotland) Act, 1907 (S.I. 1956 No. 1240); (b) in respect of county court judges and stipendiary magistrates (S.I. 1956, No. 1241); (c) in respect of certain police, special constabulary and fire service pensions (S.I. 1956 No. 1239).

The *Report on War Pensioners for 1955* has been published by the Minister of Pensions and National Insurance, the Minister of Health and the Secretary of State for Scotland (H.C. 331 of 1955–1956).

### Classification

*Selected decisions.* The Ministry of Pensions and National Insurance has published the seventh pamphlet in this series (Pamphlet M.7).

The wife of a housemaster at a public school dealt with the catering and the supervision of domestic staff, kept the accounts and drew cheques on the house banking account. The school authorities did not supervise her activities or interfere with her work in any way. These activities were part of her husband's duties and responsibilities. After she had helped her husband for some time, the bursar of the school told her that the school liked to make monetary recognition of the help given by the wife of a housemaster and monthly cheques were sent to her. It was held that she was not employed by the school under a contract of service and *decided* that she was not an employed person under the National Insurance Act, 1946, nor in insurable employment under the National Insurance (Industrial Injuries) Act, 1946, and that no one was responsible as employer to pay contributions: Decision M.47.

A barristers' clerk occupied a room in chambers and worked under independent agreements for several barristers who were members of the chambers. He was remunerated for his work on the basis of an agreed proportion of the fees payable to the barristers by solicitors. In accordance with the custom of the legal profession he sought to build up and maintain the professional practices of the barristers by interviewing solicitors and discussing matters with them. He made arrangements on behalf of the barristers regarding the dates of court and their other professional appearances. He attended to their needs when they were appearing in court and also went to their rooms in chambers if required to do so. He attended to telephone messages, dealt with the post and with the distribution of briefs and papers delivered to the chambers. None of the barristers had a right to his exclusive services. It was held that the clerk was employed under a separate contract of service by each of the barristers who occupied the chambers and *decided* that the barristers' clerk was included in the class of employed persons and was employed in insurable employment: Decision M.49.

A partner in a motor-cycle business was engaged by a company under a written contract, expressed to operate for the year 1953, to ride in certain races and competitions in the British Isles and elsewhere. He was injured by accident during an official practice in the Isle of Man. The rider agreed under the contract to ride in such races as the company might direct using such motor-cycles, fuel, oils and other accessories as the company might direct, to practise as required, and to obey all lawful orders and directions of the company. He was restrained unless the company consented otherwise from arranging to use fuel or accessories of other persons, from entering other races and from publishing any articles or giving information about the company's products. He was to receive prize money, and money paid by manufacturers of equipment and accessories used by him, and the company guaranteed that he would receive a minimum remuneration. There was no provision for the termination of the contract in the event of the rider's illness. Until April, when the racing season began, the rider worked in his own business. From April 6 until May 29 he was fully occupied in carrying out his obligations under the contract. On May 29 he was injured while practising and was unable to take part in any further racing. From October, when the season ended, he would, had he been able, have resumed working in his own business. The company, who did not regard the contract as terminated by his incapacity, paid him the guaranteed remuneration for 1953. It was held that the contract was a contract of service and that the rider's employment under the contract continued throughout the year, and *decided* (a) That the rider, during the year 1953, was included in the class of employed persons. (b) That the rider, on May 29, 1953, when riding a motor-cycle in pursuance of his contract with the company, was employed in insurable employment: Decision M.50.

The Lawn Tennis Association, with the co-operation of the Central Council of Physical Recreation and the aid of a grant from the Ministry of Education, promoted a scheme for giving instruction to school-teachers and youth leaders on the teaching of lawn tennis. The object was to teach general principles on uniform lines, showing how to make the most effective use of available time. The L.T.A. sent a professional lawn tennis coach a letter appointing him area coach under the scheme. He was one of six coaches so appointed, all of whom were on the L.T.A.'s register of professional coaches. From their previous knowledge of him, the L.T.A. were satisfied that he was a suitable person to take part in the scheme. The L.T.A. notified local education authorities and other interested bodies of the scheme, informing them of the availability of the area coach and suggesting syllabuses for courses. These bodies organised courses locally, at times convenient to the coach. The bodies were not bound to accept the services of the area coach, although they invariably did; nor was he obliged to accept engagements for any particular course. The coach was not controlled in his methods of teaching. He was remunerated by a fee for each session, and in addition received limited sums for expenses. The L.T.A. guaranteed his fee, but part of it was usually paid by the local organising body. In August each year he was resident coach at a special course organised by a teachers' training college. The college paid his fee, but was partially reimbursed by the L.T.A. The employment as coach was held not to be under contract of service. It was *decided* that the coach, in respect of his work for the Lawn Tennis Association, was included in the class of self-employed persons, and was not employed in insurable employment: Decision M.51.

An ordained priest was appointed whole-time Church of England Chaplain at a mental hospital by the Hospital Management Committee, at an annual salary. The appointment was terminable by three months' notice on either side. A list of the main duties was given to the Chaplain. He was required to administer Holy Communion at least twelve times a year to officers, staff and patients who desired it, provided that the patients were in his opinion and in that of the Medical Superintendent fit to receive it. On Sundays he conducted Divine Service at the time at which his predecessor had held it; he also conducted special services at times convenient to the nursing staff and the hospital administration. Most of his time was spent in visiting patients. Each day he was given a list of new patients and the names of other patients who were physically sick and was requested to visit them. From time to time the Medical Superintendent told him how to approach patients having regard to their mental state; sometimes he was told not to visit a particular patient. Occasionally he was summoned during the night to attend a patient who was dangerously ill. He assisted patients with matrimonial and other personal problems, writing many letters on their behalf. At the request of the Hospital Management Committee he produced a nativity play and a coronation pageant. He organised the patients' choir. He had an office in the hospital but lived outside. He had never been told to work fixed hours but in fact his work occupied him from 9 a.m. to between 5 p.m. and 7.30 p.m. daily. If he wished to have a day off in addition to that arranged on his appointment he asked permission of the Medical Superintendent. He recorded his activities in a journal and each quarter he made a report to the Hospital Management Committee. He was called before the Committee to give an account of his work and on these occasions the Committee made suggestions about it. About once a year a Chaplain from the Regional Hospital Board visited him to give advice. It was held that the employment as a whole was otherwise than under a contract of service, and *decided* that in respect of services as a Chaplain performed at the mental hospital for the Hospital Management Committee, from October 1, 1949, to February 2, 1955, the priest was included in the class of self-employed persons, and was not employed in insurable employment: Decision M.52.

A clerk articled to a partner in a firm of auctioneers and estate agents was serving under articles which provided in express terms for wages to be paid to him. The three parties to the deed did not in fact intend that the clerk should be paid wages, but that the premium should be repaid to the clerk's father by instalments. The premium was being repaid to the father on a scale which corresponded broadly to the scale of wages expressed in the deed and no wages had been paid to the clerk. It was held that under the terms of the articles the clerk was employed under a contract of service within the meaning of the National Insurance Act, 1946, and that since he had a right to sue for wages he was gainfully occupied in the employment, and *decided* that while serving under the articles between June 8, 1953, and April 15, 1955, the clerk was included in the class of employed persons: Decision M.53.

A graduate in science was awarded a maintenance allowance by the Department of Scientific and Industrial Research tenable at a college of the University of London for the period October 1, 1955, to September 30, 1957. The purpose of the award was to enable the graduate to receive full-time training in methods of scientific research. The allowance consisted of payment of approved fees and a maintenance grant of £245 a year. In accordance with the terms of the award a professor at the college selected the research problem which the graduate was to study and supervised his work. The subject chosen was required to be one which would provide adequate opportunity for intellectual training and, where appropriate, the acquisition of manipulative technique and skill. The graduate attended lectures each day and met the professor about once a fortnight for discussion. He also worked as one of a team of post-graduate students on a research project under the professor's supervision. In addition he was employed and paid by the college for three hours a week as a demonstrator. The D.S.I.R. consider it desirable that a student should, subject to the approval of his supervisor, gain some experience of teaching and demonstrating. Under the terms of the award a student is required, after the termination of his allowance, to prepare a report of his research on the lines of a degree thesis. He must submit the report through his supervisor, who will see that it is satisfactorily prepared and indicate the share of originality and initiative that belongs to the student. If the thesis is submitted for a higher degree, the student must inform the D.S.I.R. immediately and in due course report the result of his examination. It was held (a) that training in research was education and not employment, and (b) that the combined effect of paragraph 10 of Part II and paragraph 17 of Part III of the First Schedule to the Classification Regulations, 1948 (S.I. 1948 No. 1425) as amended (S.I. 1950 No. 830), was to cause the employment as demonstrator to be disregarded. (Paragraph 10 causes employment when less than four hours' service is rendered to any one employer in a week to be treated as self-employment. Paragraph 17 treats self-employment as non-employment when, *inter alia*, a person is not ordinarily gainfully occupied in such employment.) It was *decided* that while working as a post-graduate student and demonstrator the graduate was included in the class of non-employed persons: Decision M.56.

### Contributions

*Report.* The National Insurance Advisory Committee proposed minor changes in the contribution conditions relating to payment of contributions during sickness and unemployment, upgrading of contributions and credits, divorced women, time limits for credits and credits for young persons during non-employment (Cmd. 9854).

### Decisions of the Commissioner and the Tribunal

*Absence abroad.* Under the National Insurance Act, 1946, s. 29 (1) (*a*), except where regulations otherwise provide, a person shall be disqualified for receiving any benefit for any period during which that person is absent from Great Britain. Under the N.I. (Residence and Persons Abroad) Regulations, 1948 (S.I. 1948 No. 1275), reg. 7 (2), a person shall not be disqualified for receiving retirement pension if, being absent from H.M.'s Dominions, his absence does not exceed twelve months. Under the N.I. (Residence and Persons Abroad) Amendment Regulations, 1955 (S.I. 1955 No. 983) which came into operation on July 11, 1955, a person shall not be disqualified for receiving a retirement pension by reason of being absent from Great Britain.

Claimant left Great Britain on July 22, 1954, and went to U.S.A., arriving back in Great Britain on July 28, 1955. *Held*, that claimant was disqualified for receiving retirement pension for that part of her absence which occurred before the amendment of the Regulations on July 11, 1955: Decision No. R(P) 10/56.

*Day of unemployment.* Under the N.I. (Mariners) Amendment Regulations, 1949 (S.I. 1949 No. 301), reg. 14B (1), it shall be a condition with respect to the receipt of unemployment benefit by a share fisherman in respect of any day that it is a day on which he performs no work as a share fisherman.

After sixty-eight hours' continuous employment a share fisherman finished work at about 8 a.m. on a Saturday. *Held*, that unemployment benefit was not payable for the Saturday as on that day he had worked as a share fisherman: Decision No. R(U) 10/56.

Under N.I. (Unemployment and Sickness Benefit) Regulations, 1948 (S.I. 1948 No. 1277, as amended by S.I. 1955 No. 143) a day shall not be treated as a day of unemployment unless the insured person is available on that day for full-time employment in some employed contributor's employment.

Claimant held herself available for part-time employment only. She had a subsidiary occupation as a book-keeper. This work, she said, could be done in her spare time if she was employed. *Held*, that unemployment benefit was not payable as the claimant was following an occupation and was not available for full-time employment: Decision No. R(U) 11/56.

*Earnings limit.* Under the Act of 1946, section 20 (5), as amended by the National Insurance Act, 1951, s. 4 (6), a claimant's right to payment of retirement pension is reduced by the amount of his earnings over 40s. a week. Under the N.I. (General Benefit) Regulations. 1948 (S.I. 1948 No. 1278, as amended by S.I. 1949 No. 1984), reg. 4 (1) (*a*), earnings are " the net remuneration or profit derived by the person from any occupation or occupations."

A partner in a business worked for about 1½ hours a day. He drew £2 a week, which he termed " wages " plus his share of the profits which on average exceeded £5 a week. He contended that only his wages were earnings. *Held*, that he had an occupation from which the profit had to be taken into account as earnings: Decision No. R(P) 9/56.

" *Incapable of self-support.*" Under N.I. (Widows' Benefit and Retirement Pensions) Regulations, 1948 (S.I. 1948 No. 1261), reg. 2, a widow may continue to receive widow's pension which would otherwise cease if by reason of any infirmity she is incapable of self-support.

A widow was in receipt of a widow's pension on the ground that she was incapable of self-support by reason of chronic bronchitis. Reports by visiting officers, a medical board, and her own doctor showed that her condition varied from time to time. *Held*, that she was entitled to widow's pension by reason of incapability of self-support as the periods during which she was capable of work were comparatively short and infrequent: Decision No. R(G) 3/56.

" *Incapable of work.*" Under the Act of 1946, section 11 (2) (*a*) (ii), a day shall not be treated as a day of incapacity for work, for which sickness benefit is payable, unless on that day the claimant is incapable of work by reason of some specific disease or bodily or mental disablement.

Whilst claimant was being certified by her own doctor to be incapable of work by reason of anaemia, psychasthenia or neurasthenia, she was considered by medical officers of the Ministry of Health to be not incapable. The Commissioner arranged for an examination and report by a consultant psychiatrist, who considered that, though the claimant was not physically incapable of work, her psychological condition was such as to make it inadvisable for her to be at work. *Held*, that the claimant was incapable of work: Decision No. R(S) 4/56.

*Late claim.* Claimant pleaded that her doctor had said there was no need for her to visit a doctor while away on convalescence and she did not submit medical certificates for that period until she returned. *Held*, that good cause for delay in claiming had not been established. A claimant should not rely on a doctor for advice about claiming benefit: Decision No. R(S) 5/56.

*Misconduct causing loss of employment.* Under the Act of 1946, section 13 (2) (*a*), a person shall be disqualified for receiving unemployment benefit for a period if he has lost his employment in an employed contributor's employment through his misconduct.

A clerk was discharged as a result of complaints from colleagues that he used obscene language and made improper remarks. *Held*, that he lost his employment through misconduct: Decision No. R(U) 12/56.

Following an accident a van-driver was instructed not to drive. He did drive and was dismissed. The local tribunal found that he should not have driven but that he really misunderstood the instruction. They reduced the period of disqualification imposed by the insurance officer. *Held*, that, as the misconduct alleged was that claimant disobeyed an order properly given to him by his employer and as he acted on a genuine misunderstanding there was no misconduct. That being so, no period of disqualification could be imposed: Decision No. R(U) 14/56.

*Pregnancy—duration of.* Under N.I. (Maternity Benefit and Miscellaneous Provisions) Regulations, 1954 (S.I. No. 189), reg. 7 (2): " A woman who has become entitled to a maternity allowance in respect of expectation of her confinement shall cease to be entitled thereto if, before the beginning of the eleventh week before the expected week of confinement, her pregnancy is terminated otherwise than by confinement."

After claiming maternity allowance, a woman had a miscarriage prior to the eleventh week before the expected week of confinement. *Held*, that, calculating on the basis of the expected date of confinement, the pregnancy had not lasted for twenty-eight weeks from the end of the last menstrual period, and had therefore terminated otherwise than by confinement: Decision No. R(G) 4/56.

*Pregnancy—" Whole cost."* Claimant argued that her confinement took place in " accommodation in which the whole cost of the claimant's maintenance throughout the period of her confinement was paid or payable by her " in accordance with reg. 5 (1) (*a*) of N.I. (Maternity Benefit and Miscellaneous Provisions) Amendment Regulations, 1955 (S.I. 1955 No. 489). Section 4 of National Health Service (Scotland) Act, 1947, authorises the Secretary of State to make accommodation in single rooms or small wards available for patients who undertake to pay for the accommodation such charges designed to cover part of the cost thereof.

Confinement occurred in a Health Service hospital but claimant paid a charge in respect of amenity bed accommodation. *Held*, that home confinement grant was not payable as the payment made did not cover the whole cost of the claimant's maintenance: Decision No. R(G) 6/56.

*Procedure—representation.* Under N.I. (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948 No. 1144), reg. 13 (1): " During the consideration of a local tribunal of any case, the claimant . . . may be represented by any other person, not being a barrister, advocate or solicitor."

At a local tribunal hearing, the chairman refused to allow a solicitor's clerk to represent the appellant. *Held*, that the appellant was entitled to be represented by such a person as he was not a barrister, advocate or solicitor: Decision No. R(G) 5/56.

*Registration for employment.* Under N.I. (Seasonal Workers) Regulations, 1950 (S.I. 1950 No. 1220, as amended by S.I. 1952 No. 1466), reg. 2 (1), unemployment benefit is payable only if the claimant (a) has been registered for employment throughout the period of two years immediately preceding the date of claim other than during (ii) any inconsiderable period, and (b) had, during his off-season, a substantial amount of employment, *i.e.*, not less than one-fourth of the off-season.

A deckhand fisherman regularly worked only in the summer months. He had failed to register for employment for nine days in the last two years. *Held*, that nine days was an " inconsiderable period " within the meaning of regulation 2 (1) (*a*) of the Seasonal Workers Regulations, but that unemployment benefit was not payable because the claimant could not satisfy the further condition of regulation 2 (1) (*b*): Decision No. R(U) 13/56.

*Retirement—continuing to work.* Under the Act of 1946, section 20 (2) (*a*) (ii), a person may be treated as having retired from regular employment notwithstanding that he is engaged or intends to engage in a gainful occupation, if he is engaged or intends to engage therein only occasionally or to an inconsiderable extent or otherwise in circumstances not inconsistent with retirement.

A laundry packer intended to reduce her working week from forty-five hours to seventeen and a half hours on retirement. Employers confirmed that the arrangement was made on sympathetic grounds in recognition of past services, and that she would not be expected to work so hard as her fellow employees and could rest when she wished to. *Held*, that the work was not inconsistent with retirement: Decision No. R(P) 7/56.

A crofter, on reaching age of sixty-five, claimed that although continuing to work his croft he should be treated as having retired. He used to work for neighbouring farmers for a few weeks a year but had given this up. The croft consisted of 11 acres and supported three head of cattle and about 120 hens.

*Held*, that the scale of his occupation was too great to be consistent with retirement and he could not be treated as having retired. Confirmed that a marked reduction in occupational activities is not essential or conclusive in establishing retirement. The scale of the occupation being carried on is the most important consideration: Decision No. R(P) 8/56.

A greengrocer's shop assistant worked seventeen hours a week over Friday, Saturday and Monday. *Held*, that, being engaged on three days a week in work of a very active description, she could not be treated as retired from regular employment. Decision R(P) 16/55 distinguished: Decision No. R(P) 11/56.

## NATIONAL INSURANCE (INDUSTRIAL INJURIES)

### Assessment of disablement

*Report.* The Industrial Injuries Advisory Council has reported on the rules governing assessment of disablement in cases involving damage to an organ which, in a normal person, is one of a pair (Cmd. 9827).

### Benefits

*Statutory increase.* The Workmen's Compensation and Benefit (Supplementation) Act, 1956 (4 & 5 Eliz. 2, c. 51), received the Royal Assent on July 5, 1956. Under this Act, from August 29, 1956, a supplement of 17s. 6d. a week will be paid to totally disabled persons still drawing weekly payments of workmen's compensation under the old scheme.

For the Family Allowances and National Insurance Act, 1956, see above, p. 379 (see also S.I. 1956 No. 1188).

### Decisions of the Commissioner and the Tribunal

*Accident.* Under the National Insurance (Industrial Injuries) Act, 1946, s. 7, a claimant must show, *inter alia*, that personal injury was caused by accident arising out of and in the course of employment.

A leather stitcher, transferred to hand stitching after a long period on machine work, became incapable of work after three days through osteoarthritis of the fingers. *Held*. that the claimant did not suffer personal injury by accident. There was no incident which could be regarded as an accident. Decisions R(I) 18/54 and R(I) 43/55 distinguished: Decision No. R(I) 19/56.

An agricultural worker alleged that incapacity on account of " prolapsed disc " was the result of an injury at work. He had complained of a severe pain in his back when stooping to milk a cow. *Held*, on the medical evidence, that the claimant did not suffer personal injury caused by accident arising out of and in the course of his employment. " Prolapsed disc " explained and the types of incident likely to cause the condition discussed: Decision No. R(I) 20/56.

A miner collapsed and died whilst digging up packing for pillars supporting the roof. He had been so employed for three weeks and there was no material difference between the exertion involved in this work and that of stripper on which he had been previously employed. The cause of death was coronary occlusion. *Held*, that death did not result from an industrial accident. The effort involved would not have caused an increase in the demand for blood which the arteries could not supply. Normal work, however strenuous, does not cause or contribute to coronary occlusion, and the heart condition of the deceased was such that he was likely to die at any moment: Decision No. R(I) 16/56.

*Pneumoconiosis.* The cause of death of a kiln burner and grinder, who had also worked underground at a colliery for twenty-six years, was reported by the pneumoconiosis medical board to be " left heart failure from aortic valvular disease." He had been in receipt of 20 per cent. disablement pension in respect of pneumoconiosis for almost a year before his death, which occurred while he was walking uphill, after an attack of bronchitis. *Held*, on the medical evidence, that death did not result from pneumoconiosis. Post-mortem examination showed that the pneumoconiosis present was minimal and did not contribute to the condition of the left side of the heart: Decision No. R(I) 18/56.

*Prescribed disease.* Under the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948 (S.I. No. 1371, as amended by S.I. 1951 No. 306), in order that byssinosis should be prescribed in relation to the claimant he had to prove that he had been employed in insurable employment for a period or periods amounting in the aggregate to not less than twenty years " in any occupation in any room where any process up to and including the cording process is performed in factories in which the spinning or manipulation of raw or waste cotton is carried on." The regulations have been further amended by S.I. 1956 No. 118, which came into operation on February 8, 1956, and substituted " ten " for " twenty " years as the period of qualifying employment. The question in issue in the case below was whether the disease was prescribed in relation to the claimant before February 8, 1956; it was conceded that it was so prescribed from that date.

A cotton mill worker had worked from December, 1937, to October, 1954, in processes up to and including the carding process. During one-third of the period from April, 1925, to December, 1937, he had been employed as a bobbin-carrier, spending about half of his time in the card room. *Held*, that from and including October 29, 1954, byssinosis was prescribed in relation to the claimant. His work as a bobbin-carrier could be taken into account although it was not performed exclusively in the card room: Decision No. R(I) 17/56.

*Special hardship allowance.* A clerk suffered an industrial accident but continued at her regular occupation for twelve weeks whilst receiving out-patient hospital treatment. She then received medical advice to undergo manipulative treatment and incapacity for work resulted. *Held*, that special hardship allowance was payable. Regulation 4A of the Industrial Injuries Benefit Regulations provides that in the specified circumstances the period during which the claimant worked at her regulation occupation after the accident is to be disregarded: Decision No. R(I) 13/56.

**Insurable employment**

*Selected decisions.* The Ministry of Pensions and National Insurance has published the seventh pamphlet in this series (Pamphlet M.7). For decisions relating to a housemaster's wife (M.47), barristers' clerk (M.49). racing motor-cyclist (M.50), lawn tennis coach (M.51), and hospital chaplain (M.52) see above, pp. 380–382.

A woman was employed as an interviewer by the B.B.C. for a specified period of twenty-one days. She was required to interview members of the public in order to ascertain what B.B.C. wireless and television programmes they had heard or seen on the day before the interview. While engaged in this work she suffered injuries. The interviewer had undertaken similar work previously. At a meeting of interviewers held annually, she had conducted a " test interview " under B.B.C. supervision. She was aware that it was the practice of the B.B.C. to write to some of the persons whom she had interviewed to check that the assignment had been properly carried out. The interviewer was requested by letter to carry out the particular assignment, and when she agreed to do so she was sent a further letter which confirmed her appointment as interviewer to undertake the assignment specified. The letter informed her that during the period indicated she was required to carry out a specified number of interviews a day in the district allotted to her, and that the work was to be carried out in accordance with the instructions in the Handbook for Interviewers held by her. She was required to interview persons in certain income and age groups. The Handbook suggested the wording and order of the questions to be put and set out the methods for recording the answers. The interviewer was free to carry out the work at any reasonable time of day and to choose the persons and places for interviewing within the limits prescribed. In an emergency she could delegate her duties, but was required to inform the B.B.C. if she did so. She was remunerated in accordance with a fixed scale of fees when she had completed the assignment. Although the Handbook stated in some detail the objects aimed at and the best method of attaining them, there was no detailed control over the manner in which the work was carried out. It was held that the interviewer was not employed under a contract of service, and *decided* that the woman, while interviewing members of the public on behalf of the B.B.C. on December 1, 1953, was not employed in insurable employment: Decision M.48.

A maintenance foreman was injured while taking part in an industrial civil defence exercise as a member of a Civil Defence Rescue Squad of the company employing him. He was required to take part in the exercise by virtue of his being a voluntary member of the company's civil defence organisation and not by the terms of his employment as maintenance foreman.

The company's civil defence organisation was set up in pursuance of the Civil Defence Industrial Bulletin No. 1 issued by the Home Office and Scottish Home Department which invited large employers to co-operate in civil defence by setting up industrial civil defence units trained to deal with the special risks and functions of the establishment to which they were attached. These units are under the general direction of the Home Office and Scottish Home Department; their personnel train and work in close association with the local civil defence services. It was held that the employment as a member of the rescue squad was included in the employments prescribed as insurable employments by Part I of the First Schedule to the National Insurance (Industrial Injuries) (Insurable and Excepted Employments) Regulations, 1948 (S.I. 1948 No. 1456). It was *decided* that the maintenance foreman, when engaged as a member of the Civil Defence Rescue Squad, was employed in insurable employment: Decision M.54.

A man normally employed as a sheeter was killed in an accident while acting as a member of the Executive Council of a Trade Union. At the time of the accident he was visiting a factory with the Union Organiser and the Ministry of Labour and National Service Conciliation Officer in connection with a trade dispute which was taking place there. It was *decided* that the deceased, while working at the factory on March 18, 1953, was not employed in insurable employment: Decision M.55.

Against this decision of the Minister the widow of the deceased man appealed on a question of law to the High Court. The following is an extract from the judgment of Pearson J. dismissing the appeal: ". . . The widow's contention is that the deceased was at the material time working under a contract of service within the meaning of the Act with the Constructional Engineering Union. That is the question to be considered on this appeal."

Pearson J. concluded his judgment with these words: "On all those facts stated I am unable to find any separate or severable contract. The deceased was acting as a member of the Executive Council, giving leadership and bringing to bear the prestige and authority of the Executive Council by virtue of his membership of that body. He was carrying out the policy of the Executive Council as decided by himself and the other members. . . . For the reasons given I hold that he was not acting under a contract of service. Therefore, the application fails and the decision must be that he was not employed in insurable employment within the meaning of the Act."

**Prescribed diseases**

*Review.* The Minister of Pensions and National Insurance has asked the Industrial Injuries Advisory Council to advise him whether, in the light of experience and current knowledge, any adjustments should be made in the terms of prescription of the diseases included in the Schedule of Prescribed Diseases. The review is being undertaken by the Council's Industrial Diseases Sub-Committee.

## NATIONALISED INDUSTRIES

### General

*Advisory councils.* The Secretary to the Treasury stated the remuneration paid to the chairman of Domestic Coal Consumers' Council (£100 a year allowance), chairmen of Area Gas and Electricity Consultative Councils (£250 in addition to remuneration as part-time members of these Boards), chairman, members and assessor of the Air Transport Advisory Council (20 guineas, 15 guineas and 6 guineas respectively for each day's attendance). Otherwise members of these bodies are unpaid but receive travel and subsistence allowances. The Secretary to the Treasury also stated the latest available figures for the total annual cost of these bodies (excluding the above remuneration) (556 H.C. Deb. *40*, July 12, 1956).

*Finance.* Section 42 of the Finance Act, 1956 (4 & 5 Eliz. 2, c. 54), provides that any sum which the Central Electricity Authority, the Gas Council, the British Transport Commission, the Airways Corporations and the two Scottish Electricity Boards have power to borrow by issue of stock may instead be raised by the taking of an advance from the appropriate Minister. Advances under this section shall not together exceed £700m., and no such advance shall be made after the end of March, 1958. Advances shall be repaid to the appropriate Minister as the Minister directs and interest is paid on them. Reports are to be made by the Ministers and subjected to the scrutiny of the Comptroller and Auditor-General. This procedure is intended to replace the previous system of borrowing by the issue of stock and the advances will be used, in part, to repay back overdrafts. The National Coal Board is not included as it already operates under the new system (551 H.C. Deb. 862–865, April 17, 1956; 552 H.C. Deb. *53*, May 2, 1956; 554 H.C. Deb. 494–534, June 12, 1956; see also *The Times*, August 15 and 22, September 1 and 26, 1956).

### Air

*Guarantees.* The Treasury issued statements of guarantees on loans proposed to be raised by the British European Airways Corporation (H.C. 332, 395 of 1955–1956), and British Overseas Airways Corporation (H.C. 333, 396 of 1955–1956).

*Reports.* The Report has been published for 1955–1956 of the Air Transport Advisory Council with a Statement by the Minister of Transport and Civil Aviation (H.C. 338 of 1955–1956).

The Reports and Accounts have been published for 1955–1956 of the British European Airways Corporation (H.C. 363 of 1955–1956), and of the British Overseas Airways Corporation (H.C. 364 of 1955–1956).

### Atomic energy

*Report.* The second annual Report has been published (for 1955–1956) of the United Kingdom Atomic Energy Authority (H.C. 323 of 1955–1956).

### Coal

*Advances.* The Coal Industry Act, 1956 (4 & 5 Eliz. 2, c. 61) received the Royal Assent on August 2, 1956. The Act amends the Coal Industry Nationalisation Act, 1946, s. 26 (1), as substituted by Coal Industry Act, 1951, s. 1, by providing that the aggregate amount of the principal outstanding in respect of advances by the Minister of Fuel and Power for capital purposes (a) in respect of advances made before the expiration of five years from the commencement of the Act of 1956 (i) shall not at any time exceed £650m., and (ii) shall not at any time in any financial year exceed by more than £75m. (or such further sum as the Minister may by order specify for that year) the highest aggregate amount so outstanding at any time during the immediately preceding year, and (b) in respect of advances made after the expiration of the said five years shall not exceed such amount as Parliament may hereafter determine.

*Report.* The Annual Reports for the year ended June 30, 1956, have been published of the Industrial Coal Consumers' Council and the Domestic Coal Consumers' Council (H.C. 306 of 1955–1956).

### Electricity

*Guarantees.* The Treasury issued statements of guarantees on loans proposed to be raised by the Central Electricity Authority (H.C. 334, 397 of 1955–1956), South of Scotland Electricity Board (H.C. 336, 400, 406 of 1955–1956), North of Scotland Hydro-Electric Board (H.C. 327, 399, 405 of 1955–1956).

*Reports.* The Eighth Annual Reports and Statement of Accounts (1955–1956) have been published for the Central Electricity Authority (H.C. 367 of 1955–1956), and the twelve Area Boards, together with the Reports of their Consultative Councils (H.C. 368–379 of 1955–1956). The related Report of the Minister of Fuel and Power has also been published (H.C. 380 of 1955–1956).

*Undue discrimination.* Section 37 (8) of the Electricity Act, 1947, provides: " An area board, in fixing tariffs [for the supply of electricity] . . . shall not show undue preference to any person or class of persons and shall not exercise any undue discrimination against any person or class of persons. . . ." *Held,* in determining whether or not there had been " undue discrimination " against a company in levying charges for electricity, within section 37 (8) of the Electricity Act, 1947, the court was entitled to consider whether the charges levied on a particular class of consumer were excessive: SOUTH OF SCOTLAND ELECTRICITY BOARD *v.* BRITISH OXYGEN CO. [1956] 1 W.L.R. 1069; [1956] 3 All E.R. 199, H.L.

### Gas

*Guarantees.* The Treasury issued statements of guarantees on loans proposed to be raised by the Gas Council (H.C. 335, 398 of 1955–1956).

### Transport

*Charges.* See below, p. 398.

*Guarantees.* The Treasury issued statements of guarantees on loans proposed to be raised by the British Transport Commission (H.C. 337, 401, 407 of 1955–1956).

*Road Haulage.* The Minister of Transport and Civil Aviation has made an order dissolving the Road Haulage Disposal Board and transferring any remaining functions to himself (S.I. 1956 No. 1184) (for a debate, see 556 H.C. Deb. 1257–1269, July 18, 1956).

The Transport (Disposal of Road Haulage Property) Act, 1956 (4 & 5 Eliz. 2, c. 56) received the Royal Assent on August 2, 1956. The Act amends the provisions of the Transport Act, 1953, relating to the disposal by the British Transport Commission of the property held by them for the purposes of their road haulage undertaking (including the provisions as to the transport levy and the Transport Fund), and extends to the British Transport Commission certain enactments relating to holding companies.

Section 1 deals with the transfer of property to companies under the Commission's control, and amends section 4 of the 1953 Act. Section 2 deals with the transfer of property to such controlled companies with a view to the sale of their securities, and amends section 5 of the 1953 Act. Section 3 permits the transfer to a controlled company of vehicles used exclusively for purposes of particular contracts for the carriage of goods, and contains special provision in relation to the licensing of such vehicles, the transfer of other property together with the vehicles and ancillary matters. Section 4 provides for the transfer of additional vehicles to companies receiving vehicles under section 3. Section 5 reduces the number of trailers covered by licences granted to the Commission under the Transport Act, 1953, Sched. I, Part II. Section 6 deals with directions by the Minister and the exercise by him of supervision and control over the disposal of the Commission's property. Section 7 provides exemptions from stamp duty for transfers of property by the Commission to its controlled companies, and for the share and loan capital of its controlled companies. Section 8 abolishes the transport levy as from the end of 1956 and provides for winding up the Transport Fund. The Commission is deemed to be a " holding company " for purposes of the Road and Rail Traffic Act, 1933.

## PARLIAMENT

### Debates

*Bibliography.* A Bibliography of Parliamentary Debates of Great Britain has been published by the House of Commons Library under the following headings: Debates, Diaries, Proceedings, Appendices, Notes on Arrangement and Index. It is listed as House of Commons Library, Document No. 2, and has sixty-two pages.

*Judicial immunity.* See **Seychelles,** below, p. 405.

### Members

*Disqualification.* The Special Report from the Select Committee on the House of Commons Disqualification Bill has been published, together with the proceedings of the Committee, minutes of evidence and appendices (H.C. 349 of 1955–1956). We hope to print a note on its recommendations in the next issue.

*Salaries.* A debate took place in the House of Commons on the motion of the Leader of the Opposition: " That this House reaffirms its decision of May 24, 1954, regarding Members' expenses and pensions and the financial position of junior Ministers, and calls upon Her Majesty's Government to implement it without further delay." The motion was, by leave, withdrawn (556 H.C. Deb. 611–724, July 12, 1956).

*Visits.* During a debate on administration in the Seychelles, Mr. Francis Noel-Baker, M.P., stated that the Secretary of State for the Colonies had refused him access to Archbishop Makarios. The Secretary of State said that he had told Mr. Noel-Baker that he could not be held to have given any undertaking of any kind that Mr. Noel-Baker would be able to see the Archbishop in the Seychelles (557 H.C. Deb. 1457–1458, 1478, August 1, 1956). On the next day, Mr. Noel-Baker raised the matter again and submitted that the statements by the Secretary of State touched the rights and freedoms of Members of Parliament and constituted a threat to obstruct them in their legitimate work in the service of the House of Commons. The Speaker stated that he could find no precedent whatever for the doctrine that to prevent a Member of Parliament going, on his own volition, to see anybody who was in custody, was a breach of Privilege. The Speaker also stated that he could find no breach of Privilege in the alleged interference with Members' correspondence with those detained in view of the Acts under which letters could be detained and opened by a warrant of a Secretary of State. The Speaker therefore ruled that Mr. Noel-Baker had not established to his satisfaction a prima facie case of breach of Privilege which would entitle the Member to priority for any Motion (557 H.C. Deb. 1603–1609, August 2, 1956). Mr. Noel-Baker raised the matter again later on the same day on the Motion for the Adjournment and was answered by the Secretary of State for the Colonies (557 H.C. Deb. 1785–1798, August 2, 1956).

### Privilege

*Members' correspondents*—see **Seychelles,** below, p. 405, and *Visits* (preceding paragraph).

### Procedure

*Private Bills.* The Prime Minister stated the action which had been taken on a number of the recommendations of the Report of the Joint Committee on Private Bill Procedure (H.C. 139 of 1955–1956) (557 H.C. Deb. 1155–1157, July 31, 1956).

*Select Committee.* The House of Commons resolved: That a Select Committee be appointed to consider the practice of moving amendments on going into Committee of Supply upon the Navy, Army, Air and Civil Estimates; the practice relating to Money Resolutions; the extension of the Standing Orders relating to public money to expenditure from Funds partly, but not wholly, financed from the Exchequer, being expenditure not directly involving a charge upon the Consolidated Fund or upon money provided by Parliament; the numbers required to form a Quorum of, and for the Closure in, a Standing Committee; and the constitution of the Scottish Standing Committee, and to report whether any changes are desirable in the Standing Orders, practice or procedure of the House in these matters or in matters connected therewith (557 H.C. Deb. 1299–1358, July 31, 1956).

### Public Accounts Committee (House of Commons)

*Reports.* The Committee issued its Fourth, Fifth and Sixth Reports and a Special Report. The Fourth Report (H.C. 204 of 1955–1956) concerned excess votes. The Fifth Report (H.C. 282 of 1955–1956) concerned a *virement* between votes of service departments temporarily authorised by the Treasury in February, 1956. The Committee made no comment in either of these Reports. In the Sixth Report (H.C. 348 of 1955–1956) the Committee dealt with Colonial Office (Grants in Aid of Local Revenues), the Milk in Schools scheme, Non-recurrent grants to Universities, the B.B.C., Chemists' Remuneration and Hospital Staff Canteens under the National Health Service, the Export Credits Guarantee Department, the Purchase of Comet Aircraft, the British Sugar Corporation, Guarantees for Home-Grown Cereals, Fatstock, Operational Expenses of a Ministry-owned Company, Fraudulent Payment for Transport of Eggs, the Removal of a Wreck, Fees for Parking Aircraft at London Airport, Write-off of Exchequer Loans to Coal Charges Account, Atomic Energy, Home-produced Shell Eggs and certain matters relating to Service Accounts. The Special Report (H.C. 238 of 1955–1956) contained the Treasury Minutes on the First Report of the Committee for 1954–1955, and on the First, Second and Third Reports for 1955–1956; also tables setting forth the Comparison of Audited Expenditure with Exchequer Issues and the General Abstract of Appropriation Accounts for 1953–1954 from the Treasury.

## PUBLIC AUTHORITIES

### Agricultural Improvement Council for England and Wales

*Reconstitution.* The Council (Chairman: Sir Alan Hitchman, K.C.B.), first set up in 1941, recently reached the end of a further three-year period of office and has been reconstituted by the Minister of Agriculture, Fisheries and Food.

**Bank of England**

*Report.* The Report has been published for the year ended February 29, 1956 (Cmd. 9828).

**Cable and Wireless Limited**

*Report.* The Accounts have been published for 1955–1956 together with the Report of the Directors (Cmd. 9830).

**Cinematograph Films Council**

*Report.* The Eighteenth Report for 1955–1956 has been published (H.C. 344 of 1955–1956).

**General Board of Control, Scotland**

*Report.* The Annual Report for 1955 has been published (Cmd. 9807).

**Iron and Steel Board**

*Report.* The Annual Report for 1955 has been published (H.C. 350 of 1955–1956).

**Public Relations**

*Bill.* Leave was given, on a motion by Mr. J. E. S. Simon, M.P., to bring in a Bill to provide for the admission of representatives of the Press to the meetings of certain bodies exercising public functions (557 H.C. Deb. 1415–1420, August 1, 1956).

**Public Service Vehicles**

*Licensing authorities.* The Summary of Annual Reports of the Licensing Authorities for Public Service Vehicles for 1954–1955 has been published by the Ministry of Transport and Civil Aviation (S.O. Code No. 55–181–0–55).

**Sugar Board**

*Constitution.* The Sugar Act, 1956 (4 & 5 Eliz. 2, c. 48) received the Royal Assent on July 5, 1956. The main purposes of this Act are: to establish a Sugar Board with the principal functions of buying Commonwealth sugar in fulfilment of the United Kingdom's obligations under the Commonwealth Sugar Agreement, and of disposing of this sugar on a commercial basis; to apply a surcharge to sugar to finance the Board's operations; to provide for the home beet sugar industry; and to provide for the control of sugar imports in compliance with the United Kingdom's obligations under the International Sugar Agreement.

Section 1 provides for the establishment of the Sugar Board and requires it, as from the appointed day, to perform specified statutory functions, including the purchase and resale of Commonwealth sugar purchased in accordance with the Commonwealth Sugar Agreement. The Board will consist of a chairman and not more than four other members, appointed by the Minister of Agriculture, Fisheries and Food and disqualified for membership of the House of Commons or of the Senate or House of Commons of Northern Ireland; there is provision for members' remuneration, allowances and pensions (s. 2). The Minister may call upon the Board to advise him, or to act on his behalf as agents, in matters relating to sugar (s. 3 (1)–(3)); when not acting as his agents, the Board are not to be regarded as the servant or agent of the Crown, and will not be entitled to Crown immunity or privilege (s. 3 (4)). Section 4 deals with the Board's finances. Section 5 empowers the Minister to make advances, not exceeding £25m. at any time, to the Board; provides for the raising of money by the Treasury for this purpose; and governs the payment of interest on, and the repayment of, such advances. The Board's annual report and accounts are to be laid before Parliament (s. 6).

### University Grants Committee

*Returns.* The Returns have been published from Universities and University Colleges in receipt of Treasury Grant for the academic year 1954–1955 (Cmd. 9800).

## PUBLIC HEALTH

### Regulation

*Air pollution.* The Clean Air Act, 1956 (4 & 5 Eliz. 2, c. 52) received the Royal Assent on July 5, 1956. The Act makes new provisions for abating the pollution of the air. It is intended to give effect to recommendations made in the Report of the Committee on Air Pollution (Cmd. 9322).

Section 1 makes it an offence, subject to certain exceptions and (in section 2) defences, to emit dark smoke from a chimney. Section 3 prohibits the installation of new industrial furnaces unless they are capable, so far as practicable, of being operated without emitting smoke and requires notice to be given to local authorities. Sections 5 and 6 require that grit and dust from industrial furnaces and new furnaces and ovens shall be minimised and section 7 enables local authorities to require compliance with Ministerial regulations. Under section 8, local authorities may require information about furnaces, ovens and fuel consumption. Section 9 applies sections 5–8 to outdoor furnaces. Section 10 imposes special control on the height of chimneys. Under section 11, a local authority may, by order confirmed by the Minister, declare the whole or part of its district to be a " smoke control area " in which, subject to exemptions and limitations, the emission of smoke from chimneys will be an offence. Sections 12–15 provide for the payment of grants by local authorities, and Exchequer contributions, towards the cost of any necessary conversion of appliances in private dwellings, churches, chapels, buildings used by charities, etc. Section 16 provides for the abatement of smoke nuisances, extending for this purpose certain provisions of the Public Health Act, 1936, and the Public Health (Scotland) Act, 1897. Sections 17–22 deal with special cases. Under section 23, a Clean Air Council and a separate Clean Air Council for Scotland are to be appointed (see above, p. 372). Sections 24–35 cover miscellaneous matters. The Act will come into operation on a day or days to be appointed.

See also LOCAL GOVERNMENT (above, p. 375).

## REMEDIES

### Declaration

*Availability.* The plaintiff, a livery stable keeper, was required to attend a meeting of the stewards of the National Hunt Committee who were inquiring into an allegation that the plaintiff, an unlicensed trainer, had trained a horse contrary to the National Hunt Rules. The plaintiff attended the inquiry where, without any prior notification, his alleged activities in connection with the training of two other horses were considered. The plaintiff was declared a disqualified person. In an action against the committee claiming a declaration that the steward's decision was *ultra vires* and void and an injunction restraining the defendants from treating the plaintiff as a disqualified person, Pilcher J. held that, on the evidence and the true construction of the rules, the stewards were not entitled to declare the plaintiff a disqualified person.

*Held* (1) that the mere fact of the absence of formal notice of all the matters to be considered did not necessarily entitle the plaintiff to contend successfully that the proceedings were not in accordance with the rules of natural justice, and that in this case the plaintiff was not prejudiced by the lack of notice;

(2) that even though there might be no contractual link between the plaintiff and the committee and no claim in damages, the court had jurisdiction to grant an injunction and declaration and would do so in this case: DAVIS *v.* CAREW-POLE [1956] 1 W.L.R. 833; [1956] 2 All E.R. 524; *Abbott* v. *Sullivan* [1952] 1 K.B. 189, considered.

**Mandamus**

G., the landlord of a farm gave notice to quit under the Agricultural Holdings Act, 1948, to his tenants, who thereupon served a counter-notice. The County Agricultural Executive Committee decided that the Minister's consent should be given to the operation. On appeal, the Agricultural Land Tribunal reversing the committee's decision, held that, although the tenants' standard of management did not reach G.'s high standard, his taking over the farm might depreciate the production of the tenants' other land. G.'s application for an order of mandamus, directing the tribunal to determine whether in the interest of farming efficiency consent should be given, was granted. The Court of Appeal (Singleton, Morris and Romer L.JJ.) dismissing the tenants' appeal against the order of mandamus *held,* that under section 25 (1) (*a*) G. had to satisfy the tribunal that the union of the farm with his other land by the operation of the notice to quit would result in more efficient farming; the effect on the tenants had only to be considered if the question of discretion arose and, accordingly, the tribunal had made an erroneous approach to the matter which they should rehear: R. *v.* AGRICULTURAL LAND TRIBUNAL FOR EASTERN PROVINCE OF ENGLAND, *ex p.* GRANT [1956] 1 W.L.R. 1240; [1956] 3 All E.R. 321.

## SCOTLAND

**Milk Marketing**

*Amendments.* The Scottish Milk Marketing Scheme, 1933, has been published with amendments made in the Scheme up to and including May 1, 1956 (Department of Agriculture for Scotland 49–260–0–56).

See also COURTS (above, p. 371); LOCAL GOVERNMENT (above, p. 376); PUBLIC AUTHORITIES (above, p. 393).

## SUBORDINATE LEGISLATION

**Parliamentary proceedings**

*Select Committee on Statutory Instruments* (*House of Commons*). On July 3, 1956, the Committee considered twenty-five instruments and resolved that it was unnecessary to draw the attention of the House to them. The Committee ordered that the Secretary of State for the Colonies be requested to submit a memorandum in explanation of the draft British Guiana (Electoral Provisions) Order in Council, 1956 (H.C. 16–XVII of 1955–1956).

On July 17, 1956, the Committee considered seventeen instruments, including the British Guiana (Electoral Provisions) Order in Council, 1956, and resolved that it was unnecessary to draw the attention of the House to them (H.C. 16–XVIII of 1955–1956).

On July 31, 1956, the Committee considered thirteen instruments and resolved that it was unnecessary to draw the attention of the House to them (H.C. 16–XIX of 1955–1956).

*Special Orders Committee* (*House of Lords*). In the Seventh, Ninth, Tenth, Eleventh, Twelfth and Thirteenth Reports, the Committee examined thirty statutory instruments. The Committee reported, in the case of twenty-nine of these, according to their terms of reference, that the instruments (a) did not raise important questions of policy or principle; (b) were founded on precedent (except in two cases); and (c) could be passed by the House without special attention, and that no further special inquiry was necessary before the

House proceeded to a decision on the Resolution to approve. In the remaining case of the Milk (Guaranteed Prices) Order (see Seventh Report) the Committee reported (a) that the provisions of the Order raised important questions of policy and principle; (b) that the Order was founded on precedent; and (c) that the Order could not be passed by the House without special attention but that no further inquiry was necessary (H.L. (83), (108), (137), (150), (164), (169) of 1955–1956; for the Eighth Report, see above, p. 172).

## TOWN AND COUNTRY PLANNING

### Finance

*Accounts* have been published, under the Town and Country Planning Act, 1954, and the Town and Country Planning (Scotland) Act, 1954, of the sums issued out of the Consolidated Fund, of payments therefrom under Parts I and V and of certain sums received under Parts V and VI of the Acts, during 1954–1955; together with the Report of the Comptroller and Auditor-General thereon (H.C. 308 of 1955–1956).

### Powers

*Enforcement.* There is nothing in either section 16 of the Town and Country Planning Act, 1947 (which gives the right of appeal to the Minister), or in section 23 of the Act, which limits the legal right of the planning authority to serve an enforcement notice pending the hearing of an appeal: DAVIS *v.* MILLER [1956] 1 W.L.R. 1013; [1956] 3 All E.R. 109, D.C.

## TRIBUNALS AND JUDICIAL FUNCTIONS OF MINISTERS

### General

*Committee.* The Committee on Administrative Tribunals and Inquiries (Chairman: Sir Oliver Franks) has published (1) a fifth volume of the memoranda submitted by Government Departments in reply to a questionnaire; (2) four further volumes of the Minutes of Evidence; for the eleventh and twelfth days when evidence was given on behalf of the Royal Institution of Chartered Surveyors, the County Councils Association and the Federation of British Industries; and by Dr. R. M. Jackson; for the thirteenth and fourteenth days when evidence was given on behalf of the British Employers' Confederation, the Town Planning Institute, the Society of Labour Lawyers, the Association of British Chambers of Commerce, and by Professor W. A. Robson and by Mr. H. W. R. Wade; for the fifteenth and sixteenth days when evidence was given on behalf of the National Citizens' Advice Bureaux Committee, the Town and Country Planning Association, the Country Landowners' Association, and The Law Society; and for the seventeenth and eighteenth days when evidence was given on behalf of the General Council of the Bar, the National Federation of Property Owners, the Association of Municipal Corporations and the Chartered Auctioneers' and Estate Agents' Institute (the Memoranda and Minutes are published by H.M.S.O.).

*Practice Direction.* The Master of the Rolls has directed, for Appeals by Case Stated, R.S.C., Ord. 58A, that in cases in which a written decision has been given by a tribunal, containing all necessary findings of fact and indicating the question or questions of law to be decided by the Court of Appeal, a short and formal case agreed by the parties, with a signed copy of the decision of the tribunal annexed, will be accepted in place of a case stated in the usual form. This procedure should be adapted wherever practicable, as tending to save both time and expense: [1956] 1 W.L.R. 1112.

### Disciplinary bodies

*Dental committee.* An Order in Council has been made prescribing the rules for appeal to the Judicial Committee of the Privy Council from the

Disciplinary Committee set up under the Dentists Act, 1956 (see above, pp. 280–281) (S.I. 1956 No. 999).

**Lands Tribunal**

*Address.* From August 20, 1956, the address of the Lands Tribunal is 3, Hanover Square, W.1.

*Costs.* Where a local authority and a valuation officer who had obtained judgment before the Lands Tribunal were the successful respondents before the Court of Appeal and the House of Lords, the House ordered that one set of costs only be paid by the appellants to the respondents and that those costs be apportioned as to two-thirds to the valuation officer and one-third to the local authority: SHELL-MEX AND B.P., LTD. v. CLAYTON (VALUATION OFFICER) AND ANOTHER [1956] 1 W.L.R. 1198; [1956] 3 All E.R. 185, H.L.

See also COURTS, **Jurisdiction,** *Appeal from Lands Tribunal* (above, p. 369).

**National Health Service Tribunal and service committees**

*Complaints against doctors.* The Minister of Health stated that documents relating to such complaints, where upheld, are retained in the Department's files. Reports of the Tribunal are issued to the Press; executive councils may make public the facts of any case coming before medical service committees but the name of the doctor is given only where the Tribunal has directed removal from the medical list of executive councils. Approximately 2,800 complaints have been received by executive councils since 1948 and only a very small number have been found to disclose no prima facie case. Up to March 31, 1956, 2,508 cases involving doctors had been concluded; of these, in seven cases the doctor's name was removed from the medical lists of executive councils, in 355 cases sums of money were withheld from the doctor's remuneration, in eighty-one cases other action was taken, such as reimbursement of expenses incurred by patients, in 301 cases the doctor's attention was drawn to a breach of his terms of service and in 1,764 cases no action was considered necessary (555 H.C. Deb. 77–78, June 29, 1956).

*Procedure.* Regulations have been made consolidating the National Health Service (Service Committees and Tribunal) Regulations, 1948 (S.I. 1948 No. 507, as amended by S.I. 1950 No. 983, and S.I. 1953 No. 1175, all of which are now revoked), and Parts VIII and IX of N.H.S. (Supplementary Ophthalmic Services) Regulations, 1948 (S.I. 1948 No. 1273), with a number of amendments. The main amendments provide for: (1) the appointment of an ophthalmic investigation committee by Executive Councils (regulation 3 (2) (*d*)); (2) the qualifications of the chairman of a service committee (regulation 3 (3) (*b*)); (3) the investigation of complaints made against practitioners, only where they are made by certain classes of persons (regulation 4 (1)); (4) the inclusion in service committee reports of references to previous cases, only where a breach of the terms of service has been found in those cases and in the case under investigation (regulation 5 (4)); (5) the making of representations in lieu of an appeal, and instead of thereafter, in certain cases (regulations 7 (1) and 11 (2) (*a*)); (6) the limitation of, and procedural changes in, appeals against decisions of the Dental Estimates Board (regulation 18); (7) the investigation of excessive dental treatment (regulation 19); (8) the making of a fresh appointment, at the discretion of the Minister, where a person appointed has died, etc. (regulation 46); (9) minor amendments to the Rules of Procedure for Service Committees (first schedule) (S.I. 1956 No. 1077).

**National service**

*Umpire's decision.* A selected decision by the Umpire in respect of an application for postponement of liability to be called up for service under the National Service Acts, 1948–1955, has been published by the Ministry of

Labour and National Service (N.S. Code 2, Pamphlet No. 3/56, containing Decision No. 131/56 (N.S.)).

**Rent tribunals**

*Jurisdiction.* The assignees of a lease of a furnished flat referred the contract of tenancy to a rent tribunal. On a motion by the landlords for prohibition, *held*, that an assignee of a lease was not a " party to the contract " within section 2 (1) of the Furnished Houses (Rent Control) Act, 1946, and, therefore, the tribunal had no jurisdiction to hear the reference: R. *v.* TOTTENHAM AND DISTRICT RENT TRIBUNAL, *ex p.* NORTHFIELD (HIGHGATE), LTD. [1956] 3 W.L.R. 462; [1956] 2 All E.R. 863, D.C.

**Transport Tribunal**

*Decision.* The Tribunal made its Interim Decision (dated July 23, 1956) to confirm the British Transport Commission (Railway Merchandise) Charges Scheme. The Scheme, as submitted by the Commission, proposed that maximum charges should be fixed for the carriage of all goods carried by merchandise train. Section 20 (2) (*b*) (*c*) of the Transport Act, 1953, provides that every charges scheme (*b*) shall fix maximum charges except in cases where it appears not to be reasonably practicable or to be undesirable so to do; (*c*) in cases where no maximum is fixed, shall authorise the Commission to make such charges as may be reasonable, appointing the Transport Tribunal as the arbiter of what is reasonable. The Tribunal in its decision determined that it was undesirable to fix maximum charges for the carriage of (i) goods carried in owner's tank wagons, owner's wagons or road-rail tank wagons, or (ii) any consignment weighing 100 tons or more. The Scheme as confirmed therefore authorises the Commission (*a*) to make reasonable charges for such goods and consignment, (*b*) in other cases to fix maximum charges. The Tribunal amended the proposed maximum charges by introducing more subdivisions and classifications which have the general effect of lowering the maxima. (In the Matter of the Application of the British Transport Commission (1955 No. 2), published by H.M.S.O.)

*Order.* The Tribunal made an Order (dated August 9, 1956) altering charges and making other amendments to paragraphs 7, 15, 37, 38, 39 and the Second, Third, Fourth, Sixth, Seventh and Eighth Schedules of the British Transport Commission (Passenger) Charges Scheme, 1954, as altered by Orders dated August 11, 1955, and May 11, 1956 (see above, p. 273). The amendment of August 9, 1956, came into effect on September 1, 1956. (For hearings, published by H.M.S.O., see ref. 88–97–1, 2, 3, 4 of July 9, 12, August 1, 2, 1956.)

See also REMEDIES (above, p. 394).

## WALES

**Agriculture**

*Report.* The Ministry of Agriculture, Fisheries and Food published its conclusions on the Recommendations contained in the report on the Mid-Wales Investigation by the Welsh Agricultural Land Sub-Commission (Cmd. 9631) and stated that the Government was in general agreement with those recommendations and in particular that there was a need to create more stable conditions in the remoter upland areas of Wales (Cmd. 9809; see also 555 H.C. Deb. 1341–1402, July 4, 1956).

## WIRELESS AND TELEVISION

**British Broadcasting Corporation**

*Report.* The Annual Report and Accounts, 1955–1956, have been published (Cmd. 9803).

## COMMONWEALTH AND DEPENDENT TERRITORIES

### General

*Colonial development.* The Overseas Resources Development Act, 1956 (4 & 5 Eliz. 2, c. 71), received the Royal Assent on August 2, 1956. Section 1 of this Act re-defines with retrospective effect the purpose and powers of the Colonial Development Corporation established by the Overseas Resources Development Act, 1948. (The object of section 1 is to validate past activities of the Corporation and to remove doubts as to whether, in certain cases, it was acting within the powers conferred by the 1948 Act.) Section 2 provides for the exercise of the Corporation's powers in relation to the Federation of Rhodesia and Nyasaland in view of the fact that Southern Rhodesia is not a colonial territory within the meaning of the 1948 Act; the Corporation's past activities in Southern Rhodesia are validated (s. 2 (2)); in certain circumstances the Secretary of State may authorise the Corporation to exercise its powers as if Southern Rhodesia were a colonial territory within the meaning of the 1948 Act (s. 2 (3)). The Secretary of State may, by order subject to the negative parliamentary procedure, extend the powers of the Corporation to include additional enterprises (s. 3). Section 4 contains financial provisions.

The Corporation will now be able to make advances against the housing loan agreements with the Governments of Kenya (£2m.) and Southern Rhodesia (£1m.) and to complete arrangements with the Nigerian Government for establishing a building society in Lagos. Suspended negotiations for other new projects can also be resumed (Commonwealth Survey, C.O.I., August 21, 1956).

The Colonial Office have published "Colonial Development and Welfare, 1946–1955," by Roy Lewis (58–1–17–55).

*Governors.* The Governors' Pensions Act, 1956 (4 & 5 Eliz. 2, c. 64), received the Royal Assent on August 2, 1956. Its main purpose is to provide a new method of calculating the amount of a Governor's pension.

### Aden

*Colony.* An Order in Council has been made to permit concurrent appointments to certain offices (S.I. 1956 No. 996).

*Protectorate.* An Order in Council has been made relating to the powers of the Governor to make rules and orders (S.I. 1956 No. 1205).

### Australia

*Appeals.* Section 74 of the Commonwealth of Australia Constitution, 1900, provides: "No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States . . . unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council. . . ." Section 109 provides: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." It is the extent of the power that must be in debate in order to raise an *inter se* question: the extent to which such a power has been exercised, when the validity of its exercise is not in question, is apt to raise an issue under section 109, but it does not raise an *inter se* question.

A summons was issued against the respondent for using its premises for slaughtering meat for export contrary to the provisions of section 52a of the Metropolitan and Export Abattoirs Act, 1936–1952. The respondent submitted that section 52a was inconsistent with the Commonwealth Commerce (Meat Export) Regulations and therefore invalid under section 109 of the

Constitution. Under the regulations the export of meat was prohibited unless the premises at which it was slaughtered had been registered, and the respondent's slaughter-house was so registered. The High Court of Australia held that section 52a was not a valid and operative enactment and the prosecution failed. The appellant, by an Order in Council, was given leave to appeal " save as to any question as to the limits *inter se* of the constitutional powers of the Commonwealth and the State." The High Court of Australia refused the appellant a certificate under section 74 of the Constitution. A preliminary objection to the jurisdiction of the Board was taken by the respondent and by the Commonwealth of Australia, intervening, who submitted that all the issues, including the question of " inconsistency " and the question whether the regulations were *intra vires* the Customs Act, raised questions as to the limits *inter se* of the constitutional powers of the Commonwealth and the State of South Australia within the meaning of section 74. *Held,* (1) the preliminary plea to jurisdiction failed because the question at issue was a question not between powers but between laws made under powers, and on the same principle the preliminary objection failed on the issue whether the regulations were *intra vires* the Customs Act, it being accepted that they were *intra vires* the Commonwealth powers; (2) it was not intended that the Commerce (Meat Export) Regulations should override generally all provisions of a State code dealing with slaughtering, but section 52a of the Metropolitan and Export Abattoirs Act was a special condition confined to the use of premises for slaughtering for export and such special conditions were precisely the field which the regulations evinced an intention exhaustively to cover; (3) the regulations were within the powers conferred by the Customs Act and accordingly the condition imposed by section 52a was ousted and the appeal must be dismissed: O'SULLIVAN (THOMAS) *v.* NOARLUNGA MEAT (COMMONWEALTH OF AUSTRALIA, STATE OF NEW SOUTH WALES AND STATE OF TASMANIA INTERVENERS) [1956] 3 W.L.R. 436, P.C.

*Validity of State Act.* The State Transport Co-ordination (Barring of Claims and Remedies) Act, 1954, of New South Wales, is contrary to section 92 of the Constitution of the Commonwealth of Australia in so far as it purports to validate mileage charges imposed by the State Transport (Co-ordination) Act, 1931–1951, on persons operating public motor-vehicles for the purposes of inter-state trade, such charges having been held in *Hughes Vale Pty.* v. *State of New South Wales, infra,* in effect to have been unlawfully imposed: COMMISSIONER FOR MOTOR TRANSPORT *v.* ANTILL RANGER AND COMPANY PROPRIETARY; STATE OF NEW SOUTH WALES *v.* EDMUND T. LENNON PROPRIETARY [1956] 3 W.L.R. 499; 100 S.J. 566; [1956] 3 All E.R. 106, P.C. (following *Hughes Vale Pty.* v. *State of New South Wales* [1955] A.C. 241).

*Parliament, Royal Commissions and the Courts.* Professor Sawer has sent the following note: In *Royal Commission into Certain Crown Leaseholds* [1956] Q.L.R. 225, Townley J., sitting as a Royal Commissioner (with power to subpoena), surveyed at length the question whether a member of the Commonwealth Senate could be required to give evidence as to allegations he had made in the Senate, when neither the Senator nor his House agreed to such a course. His Honour decided the question without any reference to the possible special considerations arising from a Federal structure of government. Section 49 of the Commonwealth Constitution declares that until further provision (which has not been made) the privileges of the Senate shall be those of the " Commons House of Parliament of the United Kingdom," and on an examination of the English precedents, his Honour concluded that the consent of the Senate would be essential before a Senator could be permitted, leave alone compelled, to give evidence of proceedings in the House. His Honour doubted whether the Senator could be *compelled* to give evidence even if the House had consented. His Honour also held that he could not allow this privilege to be circumvented by having the Senator cross-examined as to his memory of the substantive events which he had in fact referred to in his parliamentary speech; presumably this ruling must be read in the light of the circumstances of the case, where it was clear that the only basis for putting such questions to the Senator would have been information derived from his statements in Parliament. It would be very undesirable if members of parliament could procure immunity from acting as witnesses merely by making some statement concerning the case in question in the course of parliamentary proceedings.

On another aspect of the same Commission (reported *ibid.*, at p. 239), Townley J. dealt with the relationship between Royal Commission inquiries and proceedings before the criminal courts arising out of the same matter; his conclusion was that generally speaking, while it may be improper for a Royal Commission to pursue its inquiries when criminal proceedings dealing with the same events are actually in progress, the results of the criminal proceedings are irrelevant so far as the Commission is concerned. In this particular case, a Minister of the Crown who had been acquitted of corrupt practices in a criminal proceeding was nevertheless found by Townley J., sitting as a Commissioner, to have been guilty of such practices, the issues being practically indistinguishable. The Minister forthwith resigned from the Government but not from Parliament. The precedents amply supported his Honour's view as to the relevance of the acquittal, but the result is disconcerting to lawyers and unintelligible to the lay public. It would seem desirable for parliaments generally to reconsider the interrelation between legal proceedings, civil and criminal, and the investigations of Commissions. Unless a legal proceeding is itself the subject of a Commission, the verdicts of the ordinary courts should be protected from this sort of reversal by side-wind, especially in jurisdictions providing no appeal against acquittal in criminal prosecutions.

See also CONTRACT (above, p. 368).

### Bechuanaland

*Seretse Khama.* A debate took place in the House of Commons on August 1, 1956 (557 H.C. Deb. 1490–1548).

The Resident Commissioner announced, on September 26, 1956, the British Government's decision to allow Seretse Khama to return to Bechuanaland. He told Rasebolai Kgamane, the African authority who exercises rule over the Bamangwato tribe in the absence of the elected chief, and members of the tribe at a Kgotla (tribal gathering) that both Seretse Khama and Tshekedi Khama wished to return to the Bamangwato as private persons and to take part in the political life of the tribe, and that each of them had undertaken to co-operate fully with Rasebolai Kgamane, who would preside over a tribal council of an advisory nature (*The Times*, September 27, 1956).

### British Caribbean

*Federation.* The British Caribbean Federation Act, 1956 (4 & 5 Eliz. 2, c. 63), received the Royal Assent on August 2, 1956. This Act empowers the Queen, by Order in Council (subject in draft to the affirmative procedure in both Houses of Parliament) to provide for the federation of Barbados; Jamaica; Antigua; Montserrat; Saint Christopher, Nevis and Anguilla; Trinidad and Tobago; Dominica; Grenada; Saint Lucia; Saint Vincent. Such an order may confer on the Federal Supreme Court jurisdiction to hear and determine appeals from the courts of British Guiana, the Virgin Islands, and other colonies not included in the Federation, and may dissolve the West Indian Court of Appeal. Section 3 authorises the Secretary of State to make to the Federal Government grants not exceeding £1 million towards the cost of establishing the seat of the Federal Government, and other grants, during the ten years following the establishment of the Federation, to enable the Federal Government to make grants to the governments of those federated colonies whose resources do not enable them to defray their administrative expenses. Section 4 deals with the Secretary of State's expenses incurred under section 3.

### British Guiana

*Elections.* An Order in Council has been made enabling the existing legislature of the Colony of British Guiana to make provision for the election of members to a new Legislative Council which it is proposed should hereafter be established for the Colony, and permitting registration of voters in pursuance of any such provision to take place (S.I. 1956 No. 1206).

See also **British Caribbean** (p. 401, above).

### Cyprus

*Constitutional proposals.* The Prime Minister stated that H.M.'s Government had decided to ask Lord Radcliffe to start work forthwith as Constitutional Commissioner; it would be his task to consider the framework of a new liberal Constitution for Cyprus, including safeguards for the interests of all communities and to make recommendations; he would be leaving the following day for a preliminary visit to Cyprus; H.M.'s Government intended, on his return, to draw up detailed terms of reference (556 H.C. Deb. 600–601, July 12, 1956; and see 198 H.L. Deb. 1034–1035, July 12, 1956). The Cyprus question was debated in Committee of Supply in the House of Commons on July 19, 1956 (556 H.C. Deb. 1395–1536) and in the House of Lords on July 25, 1956 (199 H.L. Deb. 205–299). Lord Radcliffe returned to the United Kingdom on August 2, 1956. During the course of a further debate in the House of Commons, the Secretary of State for the Colonies announced the terms of reference for the work of Lord Radcliffe. They are:

" To make recommendations as to the form of a new constitution for Cyprus which shall be consistent with the following requirements:

(*a*) that during the period of the constitution Cyprus is to remain under British sovereignty;

(*b*) that the use of Cyprus as a base is necessary for the fulfilment by Her Majesty's Government of their international obligations and for the defence of British interests in the Middle East and of the interests of other Powers allied or associated with the United Kingdom;

(*c*) that all matters relating to external affairs, defence and internal security are retained in the hands of Her Majesty's Government or the Governor;

(*d*) that, subject to this, the constitution is to be based on the principles of liberal democracy and is to confer a wide measure of responsible self-government on elected representatives of the people of Cyprus, but is at the same time to contain such reservations, provisions and guarantees as may be necessary to give a just protection to the special interests of the various communities, religions and races in the island."

Mr. Lennox-Boyd indicated that, by including internal security along with external affairs and defence as subjects to be reserved to the Governor, the terms of reference differed from the statement made by the Secretary of State to Archbishop Makarios in February 1956 (see above, pp. 177–179) (558 H.C. Deb. 357–456, September 14, 1956; see also 199 H.L. Deb. 861–906, September 14, 1956).

### East Africa

*Royal Commission Report 1953–1955.* Dispatches commenting on this Report have been published from the Governors of Kenya, Uganda and Tanganyika and from the Administrator, East Africa High Commission (Cmd. 9801). Commentary on these Dispatches has also been published (Cmd. 9804).

### Gibraltar

*Constitutional proposals.* The Secretary of State for the Colonies stated that certain changes would be introduced shortly. The changes to be made are: the appointment of one more unofficial member to the Executive Council; an increase in the number of elected members of the Legislative Council from five to seven; and provision for the appointment of an independent Speaker of the Legislative Council—it being understood that, in view of the possible difficulty of finding a qualified and independent person for this office, the Governor will continue to preside over the Council when the office of Speaker is vacant.

Gibraltar's first Legislative Council was inaugurated in 1950, and its composition has remained unchanged until now. It consists of the Governor, as President, three *ex officio*, two nominated and five elected members. The Executive Council consists of the Governor, as President, four *ex officio* members and three unofficial members appointed from amongst the unofficial members of the Legislative Council. The changes announced by the Secretary of State will thus mean that, for the first time, there is an elected majority in the Legislative Council, and that in the Executive Council there will be an equal number of *ex officio* and unofficial members (557 H.C. Deb. *73–74*, July 27, 1956; Commonwealth Survey, C.O.I., August 21, 1956).

*Report.* The Colonial Report 1954 and 1955 has been published by the Colonial Office.

### Gold Coast

*Status.* At the elections in July, 1956 (see above, pp. 285–286), the Convention People's Party was returned and the Governor appointed Dr. Kwame Nkrumah to be Prime Minister. On August 3, 1956, the Legislative Assembly passed a motion by seventy-two votes to none (the thirty-two Opposition members did not attend the Assembly) calling for independence within the Commonwealth. In a dispatch to the Governor, the Secretary of State for the Colonies stated that the U.K. Government intended, subject to parliamentary approval, that the Gold Coast should attain independence within the Commonwealth on March 6, 1957; that, subject to endorsement by the General Assembly of the U.N. of the resolution passed by the Trusteeship Council, British Togoland should be included within the independent Gold Coast; and that the name of the Gold Coast should be changed to Ghana (Commonwealth Survey, C.O.I., August 7, September 4 and 18, 1956).

*Supreme Court.* An Order in Council has been made providing that a judge of the Supreme Court shall retire when he attains the age of sixty-two years or at such time within twelve months after he has attained that age as the Governor, acting in his discretion, may direct (S.I. 1956 No. 997).

### Hong Kong

*Report.* The Colonial Report, 1955, has been published by the Colonial Office.

### Jamaica

*Constitution.* An Order in Council has been made amending provisions relating to the Legislative Council and House of Representatives. In particular the members of the Legislative Council are to be (*a*) three *ex officio* members, *i.e.*, the Colonial Secretary, the Attorney-General and the Financial Secretary, (*b*) such number of unofficial members (not being less than twelve) as H.M. may from time to time direct, (*c*) temporary members appointed under section 30 of the Jamaica (Constitution) Order in Council, 1944 (S.R. & O. 1944 No. 1215). The Order also prescribes the circumstances in which the seat of an unofficial member or temporary member of the Legislative Council shall become vacant (S.I. 1956 No. 1209).

*Report.* The Colonial Report, 1954, has been published by the Colonial Office.

See also **British Caribbean** (p. 401, above).

### Kenya

*Validation.* Under Royal Instructions issued in pursuance of Article VIII of the Kenya Letters Patent, 1920, the Legislative Council of the Colony of Kenya consists of eight *ex officio* members, eighteen nominated members, twenty-one elected members and seven representative members besides the Governor and the Speaker, and of the elected members one must be an Arab, fourteen must be Europeans and six must be Indians, elected in accordance with provisions made by local Ordinance, while six of the representative members are to represent the African community in Kenya. It has been decided to replace these six representative members by six more elected members who will be Africans and provision to this effect has been made by Additional Instructions dated July 20, 1956, although these Instructions have not yet come into operation. Before the Additional Instructions were issued, however, the legislature of Kenya passed a law to make provision for the six African elected members entitled the Legislative Council (African Representation) Ordinance, 1956, which was inconsistent with the existing Royal Instructions governing the composition of the Legislative Council and the powers of the legislature to enact electoral laws. An Order in Council has been made providing for the validation of the Ordinance and also for the validation of a Bill passed by the Legislative Council of the Colony on July 24, 1956, providing for the amendment of the Legislative Council (African Representation) Ordinance, 1956 (S.I. 1956 No. 1207).

See also **General** (p. 399, above); **East Africa** (p. 402, above).

### Malaya

*Penang and Malacca Councils.* An Order in Council has been made altering the style of the Nominated Councils of these Settlements to " Settlement Executive Council " and altering the qualifications of members of the Councils and the provisions relating to the official languages in the Councils (S.I. 1956 No. 1208).

### Nigeria

*Commission of Inquiry.* The Secretary of State for the Colonies appointed a Commission of Inquiry (Chairman: Sir Stafford Foster-Sutton, the Chief Justice of the Federation of Nigeria) to inquire into the dispute which arose in the Eastern Region about the relationship between the Premier (Dr. Azikiwe) and the African Continental Bank, Ltd. The Secretary of State said that this must almost inevitably mean some delay in convening the Constitutional Conference which was to have met on September 19, 1956 (557 H.C. Deb. 215–221, July 24, 1956; for the full terms of reference see 557 H.C. Deb. *143–144*, August 1, 1956). An order in Council has been made providing that where a Secretary of State appoints a tribunal of inquiry in Nigeria, the provisions of any Nigerian law relating to tribunals of inquiry may be applied thereto with any necessary adaptations (S.I. 1956 No. 1210; and see 557 H.C. Deb. 1778–1785, August 2, 1956). The Commission began its hearings on September 3, 1956.

See also **General**, p. 399, above.

### Rhodesia and Nyasaland

*Guarantee.* The Treasury issued a statement of guarantee on a loan proposed to be made to the Federal Power Board by the International Bank for reconstruction and development (H.C. 326 of 1955–1956).

*Public service.* Lord Malvern, the Prime Minister of the Federation of Rhodesia and Nyasaland, stated in the Federal Assembly on August 23, 1956, that the Federation was to have a unified Public Service, open to any person domiciled in the country, irrespective of race or creed (Commonwealth Survey, C.O.I., September 18, 1956).

*Report.* The Colonial Report, 1955, for Nyasaland has been published by the Colonial Office.

*Status.* The Prime Minister of the Federation stated in the Federal Assembly on August 2, 1956, that the main proposal submitted by him to the British Government while he was in London for the Commonwealth Prime Ministers' conference was that the U.K. Government should confer on the Federal Government and Parliament complete independence in its own sphere without affecting the territorial constitution, and that this request for technical Dominion status had been rejected (*The Times*, August 3 and 4, 1956).

See also **General**, p. 399, above.

### Sarawak

*Constitutional proposals.* The Parliamentary Under-Secretary for the Colonies stated that new constitutional arrangements would be brought into force in the near future. The Council Negri, which has legislative and financial jurisdiction, at present consists of fourteen official and eleven unofficial members, the latter appointed by the Governor to represent the various races and interests in the Colony. In addition, there are six standing members, who represented the indigenous races on the pre-1946 Council Negri and who were granted life membership of the present Council. Under the new arrangements the Council Negri will have forty-two members, of whom twenty-four will be unofficial. It will thus have an unofficial majority. The unofficial members will be elected by divisional and municipal councils from among their own members.

The Supreme (or Executive) Council, which under the present constitution consists of not less than five members, a majority of whom must be members of the Sarawak civil service and of the Council Negri, will, under the new arrangements, have ten members, five of whom will be elected by the unofficial members of the Council Negri from among their own number.

The constitution will provide for the retention by the Governor of reserved powers and power of disallowance, as is customary for legislatures in United Kingdom dependencies with an unofficial majority. These powers are necessary to allow the Governor, and through him the United Kingdom Government, to fulfil their ultimate responsibility for the good government of the territory (198 H.L. Deb. 1067–1068; Commonwealth Survey, C.O.I., July 24, 1956).

*Report.* The Colonial Report, 1955, has been published by the Colonial Office.

### Seychelles

*Administration.* A debate took place on the Consolidated Fund Bill in the House of Commons (557 H.C. Deb. 1421–1490, August 1, 1956).

*Chief Justice.* The Secretary of State for the Colonies stated that on November 6, 1954, he had received a petition from citizens of the Seychelles asking that the Chief Justice (Mr. M. D. Lyon) should not return to the territory for a third tour of duty and that he had informed the petitioners by letter on December 10, 1954, that he was unable to accede to their request (557 H.C. Deb. 418–426, July 25, 1956). Later, on a question of privilege arising out of this, the Speaker ruled that in his opinion the conduct of a person in influencing a correspondent of a Member of Parliament was not a question of parliamentary privilege. The question also arose of how far Members could criticise the activities of this particular Chief Justice in debate

(557 H.C. Deb. 651–664, July 26, 1956). Later, the Speaker ruled that the complaint against the Chief Justice must be by way of Motion and should not be discussed on the Consolidated Fund Bill (557 H.C. Deb. 925–933, July 30, 1956). For further discussion of the constitutional and procedural position see the debate on the Consolidated Fund Bill referred to in the last paragraph, above.

### Sierra Leone

*Elections.* An Order in Council has been made enabling the Governor to make provision for the election of members to a new House of Representatives which it is proposed should hereafter be established for the Colony and Protectorate (S.I. 1956 No. 1211).

*Report.* The Colonial Report, 1954, has been published by the Colonial Office.

### Sudan

*Prime Minister.* Ismail el Azhari, Prime Minister since January, 1954, was defeated in the House of Representatives on July 4, 1956. Sayed Abdullah Khalil, Secretary-General of the Umma Party, was elected Prime Minister on July 5, 1956, and formed a Government composed of members of the Umma Party, People's Democratic Party and the Liberal Party (*The Times*, July 5, 6 and 9, 1956).

*Reports* have been published on the Administration of the Sudan for 1950–1951 (Cmd. 9798) and 1951–1952 (Cmd. 9841).

*Status.* A Résumé of Developments in the Self-Determination in the Sudan has been published (Cmd. 9829).

### Togoland

*Constitutional proposals.* The Secretary of State for the Colonies stated that H.M.'s Government had conveyed to the Trusteeship's Council their view that the results of the plebiscite held on May 9, 1956, indicated a clear majority in the Trust Territory as a whole in favour of the union of that territory with an independent Gold Coast (557 H.C. Deb. *45*, July 25, 1956).

*Report.* The Report of H.M.'s Government to the General Assembly of the United Nations on Togoland under U.K. Administration for 1955 has been published (Colonial No. 323).

And see **Gold Coast**, above, p. 403.

### Zanzibar

*Constitutional proposals.* With full Arab support, the Zanzibar Legislative Council has approved the Coutts Report with certain modifications (*The Times*, August 4, 1956; see above, pp. 187, 293).

# BOOK REVIEWS

THE CIVIL SERVICE. By FRANK DUNNILL. [London: Geo. Allen & Unwin. 1956. 226 pp. 18s.]

THIS book gives a well-drawn, balanced, and realistic picture of that central area of British public administration inhabited by the higher executive and lower administrative grade officials. This middle level has not had the attention paid to it, Mr. Dunnill believes, which its importance deserves. For it is here that much of the management of a department is done. Here are the people who most directly determine the day-to-day relations of the department with the unorganised public, and who are most readily influenced by those relations. Their decisions, too, can be regarded as cumulatively formulating a considerable part of departmental policy. He therefore examines with care and insight their recruitment, deployment, and conditioning. And he finds much to commend and much that is hopeful in the qualities of, more especially, the younger officers at this level today. If we want to limn the features of the men at the top of the present service we must look back to the period around the first world war when they were being determined; and for the service of the future the characteristics are to be sought in these younger men, now in their thirties. The administrative grade itself, of whom nearly half have been promoted from lower grades, is increasingly influenced by their wider background and experience, although against this, as Mr. Dunnill recognises, is to be set the strong impact of the traditions and habits prevailing among the older officials upon those who join them from outside, and to which there is a strong tendency for them to adapt themselves.

The younger higher executive officials he describes as "the best crop of middle grade officers the service has had for a very long time." There are "new men of broader background . . . only just beginning to find their place within the Service." While the very recently developed interest of the Treasury in training has so far been almost entirely directed at new recruits to the administrative grade, much could be gained by directing it lower down the scale. Mr. Dunnill's recommendations on this subject are very well worthy of attention.

It is becoming increasingly clear that the grading system of the Service as a whole is inadequate. A new definition of administrative and executive types of duty is called for, Mr. Dunnill claims. While something may be said for his view here, there is a stronger case for more careful definition and subdivision in the lower grades which are more numerous and have a much wider range of difference between the degree of responsibility taken at their senior and junior levels. This applies particularly to the clerical grade.

When so high a proportion of actual civil servants were recruited to grades different from those they now occupy, it is apparent that a good deal of the orthodox accounts of the Service and its recruitment is out of date. Indeed, it seems to be governed now by what Mr. Dunnill does not hesitate to call "a new kind of patronage operated . . . from within the Service." It is time we had another Royal Commission of the ambit of the MacDonnell or Haldane Commissions rather than the more circumscribed and less illuminating bodies of subsequent years.

But Mr. Dunnill's book is to be recommended not only for its treatment of matters of structure. He writes much that is interesting on the work of administration. Of delegated legislation, for instance, he says that "very often the shape . . . and the effect it will have on the public, organised or unorganised, outside the Service, are largely determined at or about assistant-secretary level. In this way, senior officials are often the unacknowledged legislators of statutory provisions which other, slightly junior, officials will later regard as sacrosanct. 'The Minister is bound by the regulations,' they will write, without a qualm . . . when the cause of the difficulty is in fact a statutory Rule or Order made, not so long ago, on the advice of an official not much senior to, and not remarkably unlike, themselves—and one which could be unmade or altered on the same advice."

He finds also that there is too little meeting between the administrative and political worlds. "Just as Treasury control in the financial field is reinforced by parliamentary committees, and by a Comptroller and Auditor-General who is a creature of statute and answerable to Parliament, Treasury influence in other fields, such as, for instance, organisation and methods and training might be supplemented by not dissimilar machinery . . . there are forces here which could greatly contribute to the smooth and equitable conduct of affairs, if only they could be effectively, and safely, harnessed."

H. R. G. GREAVES.

LOCAL GOVERNMENT AND CENTRAL CONTROL. A West Midland Group Study. [London: Routledge and Kegan Paul. 1956. vii and 296 pp. 28s.]

THE West Midland Group, after seven years of survey and discussion of planning problems in their five counties, decided in 1948 that local government in the area should be studied, as an illustration of developments in the country as a whole. This book is the report, or rather the group of reports, of the committee charged with that investigation.

It is not the first publication of the Group on the subject of local government. In 1944, they produced a *Note on the Size and Function of Local Government Units.* This document, to which no direct reference is made in the present work, adopted as a fundamental principle that there should be one unit of local government entrusted with all functions, and that its size should represent a compromise between the requirements of efficiency and of local interest. The present book still holds that ideally the local government unit should be the "standard minimum-sized all-purpose authority" but considers that, in current circumstances, problems of boundaries and areas must yield precedence to more urgent matters: in particular, the redefinition of the relationship between central and local government. In the Group's view local authorities feel frustrated and prevented from giving the most efficient service to their local "consumers."

The reports in this book, therefore, are all oriented towards the problem of the central-local relationship. There is a study of expenditure by local authorities in the West Midlands, which illustrates the working of Central Government grants. The Committee advocate that grants should be based on standards of adequacy and of the cost required for any particular authority to reach that level of adequacy. All services would be grant-aided, grants being paid on a standard formula based on a system of cost accounting and predetermined national standards. It is logical, therefore, that the book should include studies of the standards of local expenditure and performance for various services provided by authorities in the West Midlands; the latter are based on 1934–1938 statistics but they throw light on the problems of trying to use unit costs for regulating Central Government grants.

The aim of the Committee in recommending this approach to grants is to ensure that local authorities should have the maximum freedom in spending not only their rates but also money received from the Central Government. In the same way, the Committee recommend that administrative control of local authorities should not be by approval in advance but should, so far as possible, be retrospective only. This doctrine is arrived at after some analysis of the administrative relationship between central and local government, including both a study of regional offices and an examination of the powers of control given to Ministers in five recent important statutes.

The study of regional organisations is probably the most novel part of the book. It picks out interesting differences in the practice and outlook of Government Departments and notes that " there was, whenever the matter of relationships in the Regional Offices was raised, universal praise for the attitude and methods of the Ministry of Health—now the Ministry of Housing and Local Government." But the Report, in its more general criticism of the new regional bureaucracy (1,369 officials in the West Midlands all told, 614 in the Ministry of Works), ignores the fact that its description is now a period piece; much of it relates to the administration of rationing of supplies and building controls in the war and immediate post-war years. This failure to distinguish more strongly between the scarcity and the classical controls impairs somewhat the analysis of the administrative relationship between central and local government. But, in comparison, this analysis brings out a number of interesting points. One is the extent to which the inspecting or supervising officers of the Central Government and the officials of local authorities share the same professional training and background; and it is suggested that so much can thus be achieved by influence and discussion that resort to the direct use of controls is largely unnecessary. Another point is the extent to which the smaller local authorities tend to turn to the Central Government representatives at regional level for advice and practical guidance, if only to help them through the mass of paper issued by the Ministries; there is possibly here some analogy with the role of the French sub-prefect as mentor to the mayors of the smaller communes in his arrondissement.

The Committee reserve their heaviest fire for the " scheme " procedure, so favoured in recent legislation, whereby the running of a local government service is governed by a scheme, which the local authority frame but which the Minister sanctions, and may be empowered to modify. For this control in advance, they wish to substitute a retrospective control, especially by audit and mandamus. Oddly enough, the book's reference to audit is of the briefest, and makes no mention of the special characteristics of district audit (not even those which have engaged the attention of Professor Robson); indeed, the report states that " district audit differs little from the auditing of the accounts of all corporations and companies deriving a revenue from the public," which may be true as to method but not as to powers. Of the Committee's other panacea, mandamus, there is even less discussion. In view of the weight which the carrying out of the Committee's views would throw on mandamus, it would have been interesting to have an account of recent cases of its use in relation to local authorities and of the legal and administrative problems involved. Even the examination of figures of standards of performance and cost did not, in fact, produce any definite lead on how to measure the amount of service rendered and the extent of the need for that service; and the Committee's recommendations on grants depend entirely on the practicability of such measurements.

These points indicate a general criticism of the book. In providing factual information about local government finance and those activities susceptible of statistical treatment, it is a valuable documentary study. In so far as it criticises the present central-local relationship, it argues its case with force and lucidity, although one need not necessarily accept its conclusions. But, when it comes to remedies, it states them without anything like full discussion of their practicability and implications. Is it too much to hope that the West Midland Group will devote another book to this purpose?

V. D. LIPMAN.

A CONSTITUTION FOR PAKISTAN. By HERBERT FELDMAN. [London: Oxford University Press. 1956. 102 pp. 6s.]

THIS short book is not, as its title might suggest, an account of the new constitution of Pakistan, but an account of events in Pakistan, from its inception up to September, 1955, having a bearing on the framing of that constitution, a discussion of the issues before the first Constituent Assembly, the Objectives Resolution, the Report on Human Rights, and the draft constitution of 1952–1954. Every student of the constitutional history and law of Pakistan will find this book invaluable, for it gives a clear, objective, and succinct account of many matters, information about which can only be secured with considerable difficulty elsewhere. An index would have enhanced its utility.

A. GLEDHILL.

THE CONSTITUTION OF INDIA. Third edition by G. N. JOSHI. [London: Macmillan & Co. 1956. xxii and 466 pp. 12s. 6d.]

THIS is one of the shorter books on the Indian constitution, and the author a well-known writer on constitutional and administrative law. It would be difficult to find a book on the subject better suited to the needs of the student of political science, or the law student approaching the subject for the first time. It is primarily intended for the student, but the general reader will find it interesting, and should have no difficulty in assimilating it. The provisions of the constitution itself are clearly and briefly explained in their historical setting, and important decisions of the Indian courts up to October, 1953, have been carefully digested. A noteworthy feature of this book is its treatment of the Part C states; the provisions of the Part C States Act are dealt with as fully as the provisions of the constitution.

A. GLEDHILL.

THE PUBLIC CONTROL OF LAND. By J. F. GARNER. [London: Sweet & Maxwell, Ltd. 1956. xxiii and 204 pp. 35s.]

FOR the first time a concise and very readable book giving a complete picture of how the public control of privately owned land is exercised has appeared. This is the latest in an impressive list of works on the law of public administration by the author, who, as Town Clerk of Andover, is admirably placed to obtain a practical and intimate knowledge of the field. The author states in his preface that the " neglect of the operation of public control over land has also meant that much of this vast body of law is virtually unknown to private practitioners, both solicitors and estate agents alike, with consequent unfortunate and sometimes expensive results to their lay clients." This work should help greatly to correct such a state of affairs. It should appeal both to practitioners and to academic lawyers specialising in this field: the legal historian may search in the index in vain for mention of such bodies as the commissioners of sewers, but the book is essentially practical and for present-day purposes.

Chapter 1 is introductory and includes extremely useful advice (pp. 7–9) on what a prospective private purchaser of land should do to ensure that he is not caught unawares if a governmental agency has already commenced exercising some statutory control over the property. Part I (Chapter 2–7), dealing with controls by local authorities, comprises rather more than half the book. Chapter 2, on town and country planning, is, not unnaturally, the longest chapter (29 pages), and includes a short consideration of national parks, new towns and town development. One may, however, be a little surprised to find no mention of *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87. Succeeding chapters deal with building controls, housing (including a discussion of the circumstances in which a local authority is enabled to fix a rent for a particular house—the general provisions of the Rent Acts are outside the scope of the book), highways, the sea (mainly coast protection—sea fisheries are also outside the scope of the book), and rivers (every tidal river has the status of a highway, and non-tidal rivers also may become navigable by dedication or by statute), and public health, etc. Part II (Chapters 8–10) is concerned with controls by central Government Departments and *ad hoc* agencies, the latter being public utility undertakings (for the most part Gas Boards, Electricity Boards, water companies and authorities, and the G.P.O.), and public corporations (the Atomic Energy Authority, the National Coal Board and non-industrial regulatory bodies). The account of the powers of central Government Departments (Chapter 8) is admirably short and pithy, and it is of interest to find that the author considers that in the event of extreme emergency (*e.g.*, after a hydrogen bomb attack) the common law would still recognise a prerogative right in the Crown, in the absence of any statutory powers, to take possession of private property in the interests of defence of the realm (pp. 125–126). He bases his view upon the old case of *The King's Prerogative in Saltpetre* (1606) 12 Co.Rep. 12. Part III (Chapters 11 and 12) deals with procedure and principles of general application. In Chapter 11, on compulsory acquisition (a more accurate description in the author's view than " compulsory purchase "), *R.* v. *Minister of Health, ex p. Davis* [1929] 1 K.B. 619, appears in a footnote on p. 164, but it might well also have been worth a reference in Chapter 4 (Housing); and *Minister of Health* v. *R., ex p. Yaffé* [1931] A.C. 494, would have provided a useful comparison Chapter 12, containing principles of general application, is residuary, though the list of definitions of some common expressions used throughout the book (pp. 182–186) might well have appeared with advantage in the introductory first chapter. *Smith* v. *East Elloe R. D. C.*, mentioned on pp. 168 and 178, has now, of course, reached the House of Lords, [1956] 2 W.L.R. 888, too late for inclusion in this edition.

One matter of substantive criticism may perhaps be raised. Co-ordinated discussion of the remedies open to a private individual in the event of excess or abuse of statutory powers is limited to pp. 190–192 at the end of the last chapter. The desirability of such brevity may be questioned, but, in addition, the author has touched on this topic in various parts of the book and not always with his more usual accuracy. On pp. 22–23 a cursory and too general reference is made to certiorari. On p. 164 the phrase " under penalty of a declaration of *ultra vires* " seems strangely loose. Does Mr. Garner mean the action for a declaration or the order of certiorari to quash on this ground (a ground not mentioned on pp. 22–23)? The author's view, on p. 179, that *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.(N.S.) 180 was really based on the doctrine of *ultra vires*, of which *audi alterem partem* may be regarded as a special application, is open to question. Certiorari appears on p. 170, and injunction on pp. 96 and 175, in addition to the other pages quoted in the index; but neither injunction nor declaration appears in the short summary of possible legal proceedings in pp. 190–192 (although hints at the existence of the action for a declaration appear in pp. 175–179 and 190–192). With respect it may be suggested that this whole subject should be revised in the next edition, for it is a pity that one fault should detract slightly from what is otherwise such an excellent book.

The volume is attractively produced, and the author has included a bibliography for further reading, a useful addition to such a concise work. Minor blemishes are few. On p. 23 [1952] 1 K.B. 338 may be preferred as the reference to *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw*, rather than just [1952] 1 All E.R. 122. In the first line of p. 68 " a " should be inserted before " term of art." On p. 99 the phrase " to communicate to a public sewer " is a trifle unhappy. On p. 109 the author appears to treat the Clean Air Bill, 1956 (commented on in an Appendix to the book, pp. 193–194), as being in force at the time of writing, which conflicts with his later statement on p. 120; and in footnote (*d*) on p. 109 " p. 119 " should read " p. 120." In line 15 of p. 166 " before doing so " might read better as " first " —the sentence as it stands is confusing; and in footnote (*r*) on the same page the last line and a half do not appear to make sense. Finally, the statement on the dust-jacket that the book is a necessary complement for students to the traditional textbooks on property law is misleading. Law teachers might hesitate to recommend it indiscriminately to their pupils. The author himself in his preface hopes that it will prove of value only for those students reading for such examinations as the B.Sc. (Estate Management) of London and other universities, and those of professional bodies such as the Royal Institute of Chartered Surveyors. For these purposes, and as a handbook for practitioners, this book should prove invaluable.

D. C. M. YARDLEY.

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